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FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73-318

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO. AND THE ASSOCIATED BELL SYSTEM COMPANIES Charges for Interstate Telephone Service, Transmittal Nos. 10989, 11027, and 11657	Docket No. 19129
COMMUNICATIONS SATELLITE CORP. Investigation Into Charges, Practices, Classifications, Rates and Regulations	Docket No. 16070

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 28, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it for consideration the following: a Motion filed by the Common Carrier Bureau Trial Staff in Docket No. 19129 to reject the testimony of Dr. Stewart C. Myers in Docket No. 16070, filed August 22, 1972; an Addendum to that Motion filed September 11, 1972; a "Comment" on the Trial Staff's "Addendum" filed by Western Union Telegraph Company on September 21, 1972; Oppositions to the Trial Staff's Motion filed by the Communications Satellite Corporation ("COMSAT") and ITT World Communications, Inc. (ITT Worldcom) on September 29, 1972; and a Reply of the Trial Staff, filed October 11, 1972.[1]

2. The Trial Staff, in its Motion, has requested that the Commission order the Hearing Examiner (now Administrative Law Judge) in Docket No. 16070 to reject, when proferred, the written testimony of Dr. Stewart C. Myers which was distributed to the parties in that proceeding on July 10, 1972. The purpose of the order would be to "protect the integrity of the Commission's hearing processes in general and of this proceeding in particular" by preventing Comsat from benefiting from its contract with Dr. Myers during the same time, the Trial Staff contends, that Dr. Myers has a consulting obligation to the Trial Staff because of a prior contract with the Commission. The Comsat contract, the Trial Staff maintains, prevents the Trial Staff from con-

[1] On October 24, 1972, Comsat filed a Motion for leave to file an additional pleading and tendered for filing a Response to the Reply of the Trial Staff. The Trial Staff, on November 1, 1972, filed comments. The Trial Staff does not oppose the granting of leave to Comsat to file the additional pleading but urges that if it is accepted for filing that the Commission consider the Trial Staff's comments. Leave to file a Response to the Trial Staff's Reply is granted to Comsat, and both the Response and the comments of the Trial Staff will be considered in this Memorandum Opinion and Order.

sulting Dr. Myers further regarding the proceedings in Docket No. 19129.

3. Comsat contends in its Opposition that Dr. Myers' contractual obligation to provide expert economic advice to the Trial Staff in Docket No. 19129 ended in June 1971 when the Commission paid Dr. Myers the balance due him under his contract, in response to Dr. Myers' written request to the Commission; that there is no conflict of interest for Dr. Myers between the Commission and Comsat; that no prejudice has been shown to the Trial Staff; and that, in any event, the relief requested would not cure any claimed prejudices.[2]

4. ITT Worldcom opposes the motions to reject or bar the proposed testimony of Dr. Myers in Docket No. 16070, contending that Dockets 19129 and 16070 are entirely different proceedings, and that the most appropriate way to treat the matter would be to permit the presiding Judge in Docket No. 16070 to determine the admissibility and materiality of the evidence proffered and, if admitted, to determine the weight to which such evidence is entitled. ITT Worldcom also suggests that if the Trial Staff in the two proceedings believe that Dr. Myers' opinions with respect to AT&T and Comsat are inconsistent or that his testimony in the two proceedings is conflicting, it would be appropriate to challenge his testimony in Docket No. 16070 through cross-examination and proposed findings.

5. The Trial Staff's Reply contends that a clear conflict of interest was created when Comsat engaged Dr. Myers to testify for it on the issue of rate of return in the Comsat Rate Case (Docket No. 16070) prior to a decision in Phase I of the AT&T Rate Case (Docket No. 19129) where he testified as an expert witness for the Trial Staff on an appropriate rate of return of AT&T. The Trial Staff's arguments come down to three major points: First, Dr. Myers has a continuing obligation to advise the Trial Staff until a decision is reached on Phase I of Docket 19129, and that it was improper for Comsat to enter into a consulting agreement with him while Docket 19129 is still pending and even more improper to seek to present his testimony in Docket 16070; second, apart from the contract, Dr. Myers has a continuing fiduciary relationship to the Trial Staff with which Comsat has wrongfully interfered; and, third, rejection of Dr. Myers' testimony in Docket No. 16070 is the only way that the harm done to the Trial Staff can be rectified.[3]

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[2] Comsat also contends that the Motion ought to have been filed with the Administrative Law Judge in Docket No. 16070. While we will continue to require that a party follow established Commission procedures, in filing interlocutory pleadings, because of the unusual nature of the questions raised herein, involving as it does a commission consultant, we believe that it would be in the public interest to dispose of the matter here and now. (See Para. 12, *infra.*)

[3] On December 21, 1972, Comsat filed another motion in Docket No. 16070 for leave to file an additional pleading, based upon the fact that the Commission had released its Decision in Phase I of the AT&T Rate Case (FCC 72–1059 released November 22, 1972). Comsat contends that this was a significant new event having an important bearing on the issues raised by the pleadings before the Commission for consideration; and it simultaneously tendered for filing a Supplemental Response to the Trial Staff's Motion to reject Dr. Myer's testimony in Docket 16070.

The Trial Staff opposes both the Comsat Motion and Supplemental Response on the procedural ground that no showing had been made by Comsat that basic fairness compels the filing of the Supplemental Response. (See *D. H. Overmyer Communications Co.*, 4 FCC 2d 496 (Rev. Bd. 1966).) The Trial Staff contends substantively that the Commission's release of the Phase I decision does not significantly affect the issue posed by these pleadings. We agree with the Trial Staff, and we, therefore, deny Comsat's Motion filed December 21, 1972, for leave to file an additional pleading.

6. We are of the view that the motion of the Trial Staff ought to be denied, because we find that the consulting relationship between Comsat and Dr. Myers has not prejudiced the Trial Staff in any substantial way. The essential facts appear to be as follows: The Commission instituted Docket No. 19129 in January 1971. In February 1971 the Trial Staff in the Docket No. 19129 retained Dr. Myers, an economic expert, for a study, analysis, and testimony with respect to the cost of capital to AT&T. Dr. Myers conducted such a study, and he prepared testimony which was duly admitted into evidence at the hearing; and he was cross-examined on this testimony on April 26 and 27, 1971. In addition, there was apparently one telephone consultation in September 1971 between Dr. Myers and the Trial Staff in Docket No. 19129.

7. The consultation contract under which Dr. Myers was retained provided, in pertinent part, that a partial payment of 50% of the total contract amount would be paid to Dr. Myers upon the satisfactory completion of the draft study, and that a final payment, representing the remaining 50% of the contract, would be rendered upon completion and acceptance of all work contemplated and performed under the contract. Dr. Myers delivered his draft testimony to the Trial Staff in March 1971, and his bill for partial payment, submitted on March 24, 1971, was paid by the Commission on April 14, 1971. While the contract specifies that Dr. Myers should be available to the Trial Staff for advice on issues related to AT&T rate of return allowances, nevertheless, Dr. Myers on June 14, 1971 requested the remaining 50% of the contract price, stating that he had completed all work specified in the contract. Payment was made by the Commission on June 22, 1971 with the notation "OK for payment Asher H. Ende, Managing Attorney, Docket No. 19129."

8. We agree with Comsat that it would be unreasonable to conclude at this late date—more than a year after final payment has been made to Dr. Myers—that Dr. Myers still has contractual obligations to the Trial Staff. As we read the Myers contract, Dr. Myers was to perform a study and prepare testimony in Docket No. 19129 pertaining to the cost of capital to AT&T. He was also required to testify, and be subject to cross-examination, regarding that testimony. In addition, he was to be available for informal advice to the Trial Staff. Dr. Myers' fee for all this was $9,850.

9. We think that it would be most unreasonable to interpret the contract as creating a fiduciary relationship binding Dr. Myers to provide advice to the Trial Staff during the entire pendency of Phase I of Docket No. 19129. Clearly, there is nothing in the contract, nor would Dr. Myers' fee suggest that either party contemplated such an arrangement. Dr. Myers considered his obligations under the contract as fully discharged on June 14, 1971 after he had testified and been cross-examined in the hearing; and the payment to Dr. Myers was without any qualification whatsoever. If the Trial Staff had considered Dr. Myers' advisory services to be essential to the conduct of the proceeding it should have reserved on that point at the time that Dr. Myers submitted his June 14, letter request. We think that the amount of the consideration involved (less than $10,000); Dr. Myers' letter of June 14, 1971; the unqualified endorsement of the

Trial Staff Managing Attorney; and the payment of the balance of Dr. Myers' fee, considered together point to the conclusion that the terms of the contract were fulfilled by both parties with payment of the balance of the fee and the fiduciary relationship came to an end. In a word, the contract was fully executed. The fact that Dr. Myers might have provided advice to the Trial Staff in September 1971 is immaterial, because there is nothing to indicate that Dr. Myers was providing this advice as a result of any contractual obligation to the Commission. In the absence of any showing that Dr. Myers may have improperly used any inside information which he might have acquired as a result of his FCC contract, we conclude that the fiduciary relationship which he owed to Trial Staff came to an end when his contract was executed; i.e., when he received his final payment from the Commission.

10. As far as imputing a breach of fiduciary obligation to Comsat because of AT&T's ownership of Comsat stock, we must note that the AT&T-Comsat relationship is permitted by the Communications Satellite Act. (47 U.S.C. §§ 701–744);[4] and while it is possible that Dr. Myers' testimony in Docket No. 16070 might be affected by his activity in Docket No. 19129 the burden is on the Trial Staff to demonstrate this with particularity. Certainly, the mere statement that Dr. Myers had testified for the Trial Staff in the AT&T Rate Case, and that AT&T has a "close relationship" with Comsat is insufficient to bar outright Dr. Myers' testimony in Docket No. 16070. If the Administrative Law Judge in Docket No. 16070 finds Dr. Myers' testimony otherwise admissible, we see no reason why the Trial Staff in that proceeding cannot seek to impeach the testimony on any permissible ground. Of course, the weight to be given to Dr. Myers' testimony is to be judged in the first instance by the presiding Administrative Law Judge. In deciding in favor of Comsat we are not unmindful of the Trial Staff's position that the Commission in effect, asked the parties in Docket No. 19129 to review their respective positions on Phase I issues to determine their current validity and that the Trial Staff would ordinarily have consulted Dr. Myers on the effect of current conditions on the cost of capital. Even if Dr. Myers had not entered into a contract with Comsat we fail to see how he would have been *obligated* to provide further advice to the Trial Staff, in the absence of a new contract. While we are not critical of the Trial Staff for failing to foresee that Phase I would be partially reopened, we do not believe that Dr. Myers ought to be under an open-ended obligation to provide advice at no additional fee. We would suggest that in the future the Trial Staff negotiate reasonable consulting terms with its experts to avoid this type of contingency.

11. The Trial Staff argues in their Comments filed November 1, 1972 that because of the special relationship existing between Comsat

[4] The Trial Staff Reply (pp. 5–6) considers the identification between Comsat and AT&T to be so complete that the name of one is substituted for the other. We disagree with this strained analysis. While there is a relationship between those two entities each has its own corporate existence, officers, Board of Directors, and shareholder. While a different question might have been presented had AT&T retained the services of Dr. Myers in these circumstances, we are of the view that no conflict of interest is necessarily presented by virtue of the Comsat-AT&T relationship.

and AT&T (even though sanctioned by the Communications Satellite Act of 1962) it was "entirely improper for Comsat to seek to sponsor Dr. Myers as a witness on rate of return in the Comsat case, given his role for the Trial Staff which opposed AT&T's position on rate of return in the AT&T case." We have already addressed the relationship of AT&T with Comsat, and we are unable to conclude that Comsat committed a illegal or unethical act in seeking to obtain the services of Dr. Myers, an acknowledged expert in this field. We are aware that the number of experts available in this type of case is quite limited; and to disqualify an expert witness for a carrier in a rate case simply because that witness had testified earlier for the Trial Staff in a case that is still pending, but where the expert's services have been concluded is simply asking too much. We assume that an expert consultant would provide his best advice to the party which had retained him; and that the party seeking the consultation is free to use or not use his advice, based upon its merits. The particular position of the party in a rate proceeding—whether it would be for or against a rate increase—is immaterial. We think that the hearing process, and particularly cross-examination, provides adequate protection to the Trial Staff if Dr. Myers' testimony in the Comsat case should be inconsistent with his testimony in the AT&T case.

12. A final word ought to be stated about the procedural points raised by Comsat and ITT Worldcom. While motions to reject testimony in a hearing ought, in the first instance, to be directed to the presiding Administrative Law Judge rather than to this Commission, since this is a matter of first impression, and involves two separate docketed proceedings, as well as a Commission contract, we have decided in the interest of expediting the proceedings in Docket 16070 to rule on the matter ourselves. This Memorandum Opinion and Orders is not considered as, in any way impinging upon the prerogatives of the Administrative Law Judge in Docket No. 16070 to determine the admissibility and materiality of the evidence proffered and, if admitted, to determine the weight to which such evidence is entitled. Of course, the Trial Staff in Docket No. 16070 will have a full opportunity to challenge Dr. Myers' testimony on any appropriate grounds other than those disposed of in this Order. However, this is not to be considered a precedent for by-passing the Administrative Law Judge in the future; and we will insist that the applicable procedural rules be followed, unless good cause for an exception is shown.

13. In consideration of the foregoing, it is ORDERED that the Motion of the Trial Staff in Docket No. 19129 to reject the written testimony of Dr. Stewart C. Myers in Docket No. 16070 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AVAILABILITY OF NETWORK PROGRAMING TIME
TO MEMBERS OF THE CONGRESS

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released February 6, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS DISSENTING AND ISSUING STATEMENTS; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. We have before us a complaint filed on June 13, 1972 by fourteen members of Congress [1] against the three national television networks (NBC, ABC, CBS) for allegedly refusing to sell complainants one-half hour of prime network time to "inform the public about and seek the public's guidance with respect to contemplated Congressional action concerning American involvement in the Indochina War" and thereby "present a contrasting viewpoint to that of the Administration on the global crisis caused by the mining of Haiphong harbor and other recent acts to escalate and extend the war." Complainants stated that prior to the adjournment of Congress a number of authorization and appropriation bills or amendments thereto would be considered that would establish dates to end United States military activities in South Viet Nam or to remove American forces. Complainants alleged that the American people had heard little about these measures from members of Congress who require the guidance of the electorate in deciding how to vote on them, and that it was therefore necessary that the networks sell complainant members of Congress broadcast time to address the public on these issues.

2. Complainants stated that Senator Harold E. Hughes, as spokesman for complainants, telephoned Dr. Frank Stanton, Vice-Chairman of the Board of CBS, on May 15, 1972, Mr. Iarricci of NBC on May 16, 1972, and Mr. James Shaw of ABC on May 16, 1972, to request the purchase of time. Their request was allegedly rejected by CBS on May 15, 1972 on the grounds that CBS had fulfilled its fairness doctrine obligations in presenting views contrasting with the President's and that CBS does not sell time to individuals for the presentation of

[1] The Honorable Harold E. Hughes, Senator, Iowa; Alan Cranston, Senator, California; Fred E. Harris, Senator, Oklahoma; Philip A. Hart, Senator, Michigan; Vance Hartke, Senator, Indiana; Mike Gravel, Senator, Alaska; Daniel K. Inouye, Senator, Hawaii; Herman Badillo, Representative, New York; John Conyers, Jr., Representative, Michigan; Donald M. Fraser, Representative, Minnesota; Henry Helstoski, Representative, New Jersey; Abner J. Mikva, Representative, Illinois; Donald W. Riegle, Jr., Representative, Michigan; and John F. Seiberling, Representative, Ohio.

views on controversial issues.[2] NBC allegedly never answered Senator Hughes' request, although it promised to do so by May 23, 1972, and ABC allegedly rejected the request on May 16, 1972 for reasons similar to those advanced by CBS.

3. Petitioners' complaint requested the following relief: (1) that the Commission issue a declaratory ruling to the effect that the networks are required to sell or otherwise make available a reasonable amount of time to members of Congress who represent the views of a substantial number of the members, so that they may present information to, and seek the guidance of, the American electorate regarding prospective congressional action on matters of overriding national importance, unless the networks are prepared to demonstrate that a reasonable amount of time has been devoted to these purposes; (2) that the Commission order the networks to sell, or otherwise make available, a reasonable amount of time to complainants in this case for the purposes described in (1), since the networks have not and cannot show that they have made available to members of Congress a reasonable amount of time for discussion of pending anti-war congressional measures which are of national importance; (3) that the Commission expedite the processing of this complaint and request by requiring the respondent networks to file their responses to this pleading by June 19, 1972; by granting complainants leave to file a reply by June 20, 1972; and by ruling by June 21, 1972; and (4) in the alternative, that the Commission grant complainants interim relief by ordering the networks to sell or otherwise make available to complainants a reasonable amount of time for the purposes described above. The Commission denied complainants' request for expedited consideration and interim relief on June 16, 1972. See *In the Matter of Availability of Network Programing Time to Members of the Congress*, 35 F.C.C. 2d 531 (1972), motion for summary reversal or interim relief denied sub nom. *Harold E. Hughes, et al.*, v. *F.C.C.*, Case No. 72–1560, C.A., D.C., June 21, 1972. The merits of the complaint of course remained before us.

4. The petitioners offered three principal arguments in support of their complaint: (1) that the Constitutional doctrine of checks and balances requires that members of Congress have some access to the television medium; (2) that the First Amendment precludes the networks from denying to Congress, through its membership, some access to the airwaves; and (3) that the public interest standard of the Communications Act requires the networks to sell or otherwise make available some broadcast time to members of Congress. In support of the first of these positions, it is urged that the governmental powers of making and executing the laws were apportioned between the Congress and the presidency in order to protect the governed from a concentration of potentially tyrannical power. It is said that the separation of powers concept was not envisioned as self-executing, and that the balance between the branches of government was to be preserved, *inter alia*, by

[2] Complainants have attached a letter dated May 23, 1972, from CBS to Senator Hughes indicating that CBS rejected the Senator's request because CBS believed that (a) the sale of time to individuals for the discussion of controversial issues would be an inappropriate abdication of licensee journalistic discretion and would put a premium on the ability of particular spokesmen to buy time; and (b) CBS had fulfilled its fairness obligations in presenting views in opposition to the President's views on the administration's policy in Indochina, including the mining of Haiphong Harbor.

the requirement that each branch communicate its activities to an appropriate constituency or body. Thus, complainants argue, Article I, Section V, Clause 3, of the Constitution requires Congress to keep a "journal" of its proceedings by which the people can be informed of congressional activities, while Article II, Section III, of the Constitution, on the other hand, requires the President to give the Congress information on the state of the union from time to time. At no point does the Constitution explicitly refer to direct communications from the President to the people, complainants assert. Citing several of the Federalist papers, complainants further argue that the President's direct contact with the electorate was to be limited, but that the founders intended that the Congress should provide and receive information from the public in properly fulfilling its constitutional responsibilities. Complainants believe that network policies of never refusing a Presidential request for air time to address the public have given the President a great and improper advantage over the Congress in communicating with the American people.[3] Since television is the most powerful mass communication device known and the most important source of information for most people it should be politically neutral, complainants argue. Otherwise the balance of powers created by Articles I and II of the Constitution will be destroyed, with the advantage of access to the airways concentrated in the executive branch and denied to the Congress.

5. With particular reference to the Indochina war issue, complainants assert that Congress has a role in checking Presidential excesses in committing troops and resources to that conflict, if such excesses exist, but that for the last several years, ". . . the American people have heard only half a debate on the Indochina war—the President's view of the Executive's role in the conduct of the war," because the President has had significant access to the people through television to discuss the war while members of Congress have not had comparable opportunities. While complainants recognize that it is desirable that the President keep the public fully informed on the war issue, they maintain that this direct interaction between the President and the public has altered the relation between the branches of government and between the branches of government and the people.[4] While complainants recognize that members of Congress and spokesmen for the Democratic National Committee have presented views in opposition to the President's on the war, it is said that none of those appearances presented the viewpoint of members of Congress relating to the exercise of Presidential power or the issue of what, if anything, the Congress should do to check the exercise of such power. The appearances

[3] This change from the situation allegedly contemplated by the Constitution is illustrated, complainants argue, by the State of the Union Address. What was originally a constitutional obligation of Presidential communication with Congress has become, through television, a vehicle for the President to communicate simultaneously and directly with the electorate, thus putting the Congress on the defensive in responding to Presidential initiative. The Congressional response, however, unlike the Presidential address, is not broadcast live, in prime time, simultaneously on all networks, but is instead covered in news broadcasts or on panel shows where members of Congress have no control over format, backdrop, time, etc.

[4] The complaint thus referred to pending major resolutions relating to the termination of all military activities in Vietnam by particular dates, asserting that the public had heard little about these particular measures from Members of Congress who require the guidance of the electorate in deciding how to vote on them.

were partisan and therefore inadequate to preserve the integrity of Congress as an independent branch of government or to maintain the system of checks and balances. Moreover, in an era denoted by a bipartisan foreign policy, partisanship is an insufficient guarantee of the public's right to hear dissenting congressional views or to assure the functioning of the system of checks and balances. Complainants assert, therefore, that while there may have been debate on the merits of the President's war policies, there have been few or no affirmative presentations of congressional alternatives, and little or no time allowed for congressional appeals for public support of increased congressional control of the war.

6. Complainants also argue that the public interest standard of the Communications Act of 1934 requires that the networks make available the broadcast time requested. Complainants maintain that the public interest standard requires licensees to cover controversial issues, and to devote considerable time to coverage of political affairs because it contributes to an informed public. Complainants observe that the Commission, on this ground, has endorsed the network practice of affording time for Presidential addresses, see *Committee for Fair Broadcasting*, 25 F.C.C. 2d 283 (1970), and that this public interest is equally applicable to members of Congress, so that the Commission must consequently grant the relief requested.

7. In response, the networks argue that the declaratory ruling sought by complainants is not required by the alleged necessity of preserving the constitutional system of checks and balances. Respondents argue that complainants have failed to cite any authority in support of that argument. Moreover, NBC argues, the complainants have suggested an extraordinary remedy for the problem they perceive: the appropriation and use of privately owned broadcast facilities to remedy an alleged imbalance in the structure of government. CBS observes that nowhere in the Constitution is a duty imposed upon the press to maintain the balance of power between the governmental branches, nor is any power granted to the Federal government in the Constitution to compel private institutions to cooperate in correcting an alleged imbalance in such powers. NBC also argues that if the framers had intended to require the press to provide equal access to the branches of government, the Constitution would have so specified. Instead, it was intended that the press be free of all governmental control or interferences and not be required to turn over blocks of time or space to a branch of government for its particular use.

8. Complainants' reliance on the Constitutional requirement that Congress maintain a "journal" as evidence that the framers intended that members of Congress be able to communicate with their constituencies is said to be misplaced, because the journal fulfills a recording function and operates after the fact to provide information on Congressional actions, and not, as complainants suggest, to communicate an interchange of views between members of Congress and their constituencies prior to a vote on pending legislation. It is also maintained that contact between members of Congress and their constituencies was established through the election process and not through press communications. Complainants are also said to misconstrue the

roles of the branches of government, since individual members of Congress have a need to communicate with their respective constituencies, but not necessarily with all the people on all national issues. Respondents observe in this connection that complainants represent only 14 of the 535 discrete constituencies represented in Congress, while the President, as one of the only two nationally elected officers, is responsible to, and must communicate with, the whole electorate.

9. The respondent neworks do not explicitly answer complainants' public interest argument, but do address themselves to the public interest implications of the checks and balances argument. First, the networks disagree with complainants' initial premise that there has been any imbalance in use of the television medium between the President and members of Congress which could be said to alter the system of checks and balances. They also insist that their public interest obligations have been fulfilled in that access has been afforded to members of Congress, the public has not been left uninformed about the war or Congressional views thereon, there has been no violation of the Fairness Doctrine, and current Commission policy does not mandate the relief complainants seek. The networks argue that no showing has been made by complainants under the Fairness Doctrine or otherwise that there has been any imbalance in the actual appearance of members of Congress and the President, or that members of Congress have not been afforded access to address their constituencies. CBS claims that it regularly presents members of Congress in free time, on news and public affairs programs, that in 1971, for example, there were 687 appearances by members of Congress in CBS Television Network news and documentary broadcasts, and that in the 36 days between the President's announcement of the mining of Haiphong Harbor and the filing of the instant complaint, there was 19 appearances by members of Congress on regular CBS news programs to express views critical of the Administration, in addition to other appearances by members of Congress in special news programs, interview programs, etc. CBS correspondents also covered the introduction and discussion of Congressional bills to end the war or cut off war funds. NBC claims that complainants' assertion that the American people have heard only half a debate on the Indochina war—i.e., the President's view of the Executive's role in the conduct of the war, or that members of Congress have been denied access, is insupportable.

10. NBC views the issues raised in this complaint, i.e., the propriety of the President's exercise of power in conducting the war and the consideration of pending Congressional action to limit the President's powers, as sub issues of the broader Vietnam War issue, an issue it has covered extensively. NBC states in its brief, and by exhibits reviewing its public affairs and special news programming, that it has afforded adequate coverage to members of Congress on the Indochina war issue. NBC also notes that to the extent members of Congress seek to communicate with their own constituencies, they do not require national exposure, and that NBC's owned and operated stations have afforded access to members of Congress in their service areas. NBC also states that it has no policy precluding the sale of time to members of Congress for the discussion of controversial issues, that in May, 1970 it

sold such time to a group of Senators, including Senator Hughes, a complainant herein, that it considers such requests as one means of informing the public on significant issues, and that upon receipt of complainants' request to buy time, NBC informed complainants it would attempt to clear one hour of prime time (9:30 P.M. EDST) on May 23, 1972 for complainants' use. After the filing of this complaint, NBC offered 15 minutes of prime time (8:00 P.M. EDST) on June 26, 1972, which offer complainants allegedly rejected because of insufficient funds. NBC also states that a review of its public affairs programming for sample periods (April, May 1970, 1971 and 1972) shows between 41 and 70 appearances by members of Congress on the NBC television network in regularly scheduled public affairs or special news programs alone.

11. ABC construes the complaint as raising only one issue under existing law, i.e., whether the ABC television network has given adequate and fair opportunity for the public to be informed about the various facets of the Vietnam war, including the views of members of Congress about the war and the appropriate roles of the Congress and the President in attempting to end it. With respect to the complaint that members of Congress are denied access to the television medium comparable to that afforded the President ABC states that Congressional spokesmen appeared on ABC to discuss the Vietnam war 47 times since the beginning of the Nixon Administration. ABC outlined its record in affording access to members of Congress in its special news and public programming, showing that there were 50 appearances by members of Congress between January 1, 1971 and February 15, 1972 over the ABC television network.

12. Respondents further argue that complainants have no viable claim under the Fairness Doctrine, since the Fairness Doctrine is issue oriented and provides no right of access for particular individuals or groups except in the personal attack or political editorializing situations. Recognizing that the Fairness Doctrine is applicable to Presidential speeches dealing with controversial issues of public importance, they observe that the Commission and courts have refused to require that equal time or other right of response be granted to any particular group. Respondents assert that the scheduling of Presidential broadcast appearances is part of the journalistic process and depends upon the licensee's determination of the newsworthiness of the appearance. No other individual has powers similar to those of the President or makes decisions of comparable magnitude. Consequently, equal or comparable treatment of the views of other persons, even members of Congress is not compelled by journalistic considerations. Complainants' proposals would require that time be afforded without regard to the newsworthiness of the subject. To require such treatment would undermine the trustee role of the licensee and would substitute government control for the editorial independence of the television medium, according to ABC and NBC, a result inconsistent with the regulatory scheme adopted by Congress and expressed by the Commission in the Fairness Doctrine.

13. In reply, complainants state that the networks have distorted the nature of their claim. They say that this is not a Fairness Doctrine

case, and that complainants are not seeking merely to present a "congressional point of view" or to obtain an automatic right of response to Presidential addresses, but rather a ruling that the networks have some obligation to allow some members to buy or otherwise obtain broadcast time to seek the guidance of the electorate on matters pending in Congress, pursuant to recognizable standards administered by licensees, and that a flat ban on the sale of time for such discussion of important national issues is unreasonable, unconstitutional and violative of the Communications Act of 1934. Since this complaint is not grounded in the Fairness Doctrine, complainants argue, the networks' showing that they have afforded the public access to contrasting views on the war is unresponsive and does not demonstrate that the public has been informed of the specific measures pending in Congress or that Congress has been able to secure public guidance on those issues. Similarly, the showing that particular members of Congress have made broadcast appearances fails to show that such appearances were related to the specific legislation complainants wish to discuss. Complainants reassert that the network practice of discriminating in favor of Presidential speech and against Congressional speech by consistently granting Presidential requests for time is violative of both the First Amendment and the public interest. Network responses that the President's role is unique among governmental officials and therefore warrants public access, and that members of Congress are permitted to make broadcast appearances by licensees, do not refute complainants' contention of unlawful discrimination in access to the media in favor of the President. The Congress is a coordinate branch of government, complainants argue, and has specific and unique powers as important as those of the President. Consequently, members of Congress have as great a need to communicate with the public on matters of national importance as does the President. Members of Congress are national officials, complainants assert, dealing with issues of national importance. The requested access is needed to inform the entire electorate of pending legislation and to seek guidance for the entire Congress.

14. To a considerable extent, the complaint before us in this proceeding raises questions already decided adversely to the complainants' position. Thus, we have previously decided that the First Amendment does not confer a right of access to broadcast facilities,[5] and that neither the public interest nor any Congressional enactment requires licensees to sell time to particular groups for the discussion of public controversial issues. *In Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 294–296 (1970),[6] we rejected the contention that "the Commission should require networks to provide time to any substantial group of senators opposing the President's views on a controversial issue of national importance wherever the issue is one in

[5] *Democratic National Committee*, 25 F.C.C. 2d 216 (1970), reversed *sub. nom. Business Executives' Move for Vietnam Peace* v. *Federal Communications Commission*, 450 F. 2d 642 (D.C. Cir. 1971), cert. granted and mandate stayed, 405 U.S. 953 (1972). In view of the fact that the issue of a First Amendment right of access is now pending before the Supreme Court, we will not reexamine that question here. See also, *In the Matter of the Handling of Public Issues under the Fairness Doctrine & the Public Interest Standards of the Communications Act*, 33 FCC 2d 800,804 (1972).

[6] On another issue decided in this same opinion, the Commission was reversed in *Columbia Broadcasting System, Inc.* v. *F.C.C.*, 454 F. 2d 1018 (1971).

which the Senate has a role to perform in seeking resolution of the issue, and the President has initiated debate via nationwide television." We refused to single out any group of senators as being entitled to time to respond, pointing out that "members of the House, Governors, and other public or private officials would be just as appropriate spokesmen." We are now engaged in a broad review of the Fairness Doctrine in an Inquiry instituted by a notice released on June 11, 1971, Docket No. 19260, 30 F.C.C. 2d 26. This Inquiry includes the question of access to the broadcast media for the discussion of public issues, and we would normally leave the questions presented by the present complaint for resolution in the wider ranging proceeding. However, in view of complainants' request for expedited action and the relatively narrow scope of their complaint, we will consider it separately.

15. The basic question is whether complainants' new contentions take this case out of our general policy against requiring licensees to depart from ordinary Fairness Doctrine concepts by making time available to particular persons or groups. As our extensive summary of the pleadings makes clear, the primary new consideration put before us is the claim that the Constitutional separation of powers mandates special treatment of members of Congress seeking to communicate with the public on issues to be considered by Congress. Complainants do not contend here that the networks have failed to fulfill their responsibilities under the Fairness Doctrine, but that a right of access to broadcast facilities exists for members of Congress under the stated conditions, over and beyond the requirements of the Fairness Doctrine. We cannot agree. We see nothing in the arguments before us to warrant a change in our established policy. The concept of a separation of powers among the branches of the Federal government is deeply rooted in the Constitution and well understood. And there can be no dispute over the importance in this scheme of the legislative powers conferred upon the public's representatives assembled in Congress. But recognition of these basic facts of governmental life does not take us to the next step—that either the Constitution or the public interest standard of the Communications Act mandates special access, enforced by the Commission, for Congressional groups. Our earlier decisions cited above make clear our view that the Act does not confer the claimed right, and the Constitution says nothing on this subject, save for the requirement that a journal be kept. We do not read that requirement as having the consequences complainants attach to it, and while we recognize that the Constitution would not be expected to take specific account of radio and television, we also see no necessary nexus between the execution of congressional functions and an allocation of nationwide television or radio time to members of Congress. It may well be that particular members believe that the use of network facilities is important, or even essential, to proper communication with the public. But the Constitution does not command such communication, and the Constitutional prerogatives and powers of Congress remain intact without it. We do not find warrant in anything put before us for such a novel reading of the Constitution. We note in this connection the language of the Court of Appeals in an opinion rejecting the claim of the Democratic National Committee to equal time to respond to Presidential addresses

(*Democratic National Committee* v. *F.C.C.*, 460 F. 2d 891, 905 (D.C. Cir. 1972):

> One of the problems faced by DNC is the coverage given the President by the media and it is obviously because of this wide exposure they seek our creation of a new corollary. We are not unsympathetic to the plight of the party out of the White House but sympathy cannot be allowed to deter the public from the maximum information it can obtain. One of the primary sources for public information concerning the nation and its welfare is from the Presidential broadcast. While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party. In matters which are nonpolitical the President's status differs from that of other Americans and is of a superior nature.

16. Turning from the contention based upon the Constitution, to the more general area of the public interest, we cannot be insensitive to the ramifications of departing from our prior holdings to the extent urged here. We have been furnished no reasonable guide, and see none, for determining the makeup of the various Congressional groups to which the asserted right would accrue. In view of the number of Congressmen who could be expected to seek access, the divergencies in views that could be expected on any particular issue because of partisan, political, philosophical, regional, or other differences and interests and because of the nature of the Congressional system, it is extremely doubtful that either licensees or the Commission could consistently implement any objective and impartial system of access. Nor do we believe that the ruling requested here could be logically limited to members of Congress seeking national access and denied to local representative leaders seeking local access to address their constituencies. See *Complaint of the Senate of the Commonwealth of Puerto Rico*, released October 13, 1972, FCC 72–922. Our experience with the Fairness Doctrine indicates that it would be exceedingly difficult, if not impossible, to draw a reasonable and logical line as to which particular persons or groups would have the right to access and which would not. Adoption of the rule requested here would go far toward making licensees act as common carriers, contrary to the congressional scheme. See Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. 153(h).

17. The networks have presented extensive evidence indicating that members of Congress have been offered substantial access to the media to discuss the war and other important congressional matters. Complainants, therefore, have not supported their assertions that ". . . the American people have heard only half a debate on the Indochina war . . ." or that members of Congress are denied access to the television media. In this situation, and certainly in advance of completing our overall review in Docket 19260, we are not convinced that it would serve the public interest to attempt to create any category of group

or individual access. Nor do we believe that the public interest standard requires the adoption of such rigid and inflexible rules to achieve the goal of an informed public. The history of the Fairness Doctrine dictates otherwise. As we said in our most recent discussion of the handling of political broadcasts under the Fairness Doctrine in Docket 19260, 36 F.C.C. 2d 40, (1972): "The genius of the Fairness Doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate . . . Thus, the arguments for flexibility, rather than mechanical rules, . . . remain persuasive." The adoption of complainants' proposals, contrary to our long recognized policy, in order to remedy an alleged frustration of congressional responsibility, would constitute a rigidifying step which Congress itself has not chosen to take.[7] Congress is certainly not without power to amend the Communications Act in order to create some formal right of congressional access if it considers such a step necessary to the fulfillment of its functions or preservation of its powers vis-a-vis the President.[8] However, no congressional action of any nature has been taken, and we are of the view that the action urged upon us would not serve the public interest. We believe it preferable to continue to rely upon the constraints of the Fairness Doctrine and the journalistic discretion of licensees to insure that the public is adequately informed on issues of national importance and the views of our elected officials on such issues.

18. Accordingly, IT IS ORDERED, That the petition for a declaratory ruling filed June 13, 1972 by fourteen members of Congress is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

Although the circumstances are not entirely parallel, most of the reasons for my dissent are enunciated more fully in a comparison opinion relating to the request of the Black Congressional Caucus [1] for television time and I will not repeat them here. Moreover, I am aware that the Supreme Court will soon depose on the entire area of Congressional access [2] when it reviews the Commission's decision (decided previous to my appointment) in *Democratic National Committee.*[3]

My point is simply that I believe that Congress should be afforded time to address the public on their views on urgent national issues, and I think that broadcasters, acting in the public interest, should

[7] We note that the one recent congressional proposal to require congressional access by amendment to the Communications Act, S.J. Res. 209, 91st Cong., 2d Sess., expired in the Senate Subcommittee on Communications upon adjournment of the 91st Congress.

[8] In one recent amendment to the Communications Act, Congress authorized the Commission to revoke a station's license or construction permit "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal Elective office on behalf of his candidacy." 86 Stat. 3, 47 U.S.C. 312(a)(7).

NOTE.—For Statement of Commissioner Johnson (see FCC 72-1193; re The Black Caucus of the United States House of Representatives).

[1] See my opinion in the matter of *Complaint of the Black Caucus of the United States House of Representatives,* —— F.C.C. 2d —— (1973).

[2] Id., fn. 12.

[3] 25 F.C.C. 2d (1970).

make time available. As a matter of procedure, and to avoid an insurmountable burden on broadcasters, I believe that the appropriate choice of spokesmen should be left to Congress. Perhaps the majority and minority leaderships of the House and Senate could select spokesmen on a roating basis or utilize some other equitable method of apportioning the privilege.

In this period when people are talking about its possible loss of effect, Congress should not have to plead or sue for media time to talk to its electorate. It's role is far too important in our American political system.

F.C.C. 72-1193

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
THE BLACK CAUCUS OF THE U.S. HOUSE OF REPRESENTATIVES
against
AMERICAN BROADCASTING CO., INC., COLUMBIA BROADCASTING SYSTEM, INC., AND NATIONAL BROADCASTING CO., INC.

MEMORANDUM OPINION AND ORDER

(Adopted December 20, 1972; Released February 6, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND HOOKS DISSENTING AND ISSUING STATEMENTS; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. The Commission has before it (1) the complaint and request for declaratory ruling by the Black Congressmen of the U.S. House of Representatives[1] (Black Caucus), filed on February 1, 1972; (2) comments in opposition by the American Broadcasting Companies, Inc. (ABC), the Columbia Broadcasting System, Inc. (CBS), and the National Broadcasting Company, Inc. (NBC), dated March 20, 1972; (3) the Black Caucus' reply to the oppositions of ABC, CBS, and NBC filed on April 20, 1972, and (4) comments of the National Committee for a Effective Congress in support of the Black Caucus' petition, filed on May 15, 1972.

SUMMARY OF PLEADINGS

2. The Black Caucus (hereinafter petitioners) requests that the Commission direct the three national television networks to make available to them a free half—or full—hour of prime evening time to respond to the President's 1971 State of the Union message so that they can present their views on racial and other important issues. President Nixon delivered his 1971 State of the Union Address to a joint Session of Congress on January 22, 1971, at 9:00 p.m. E.S.T. The Presidential message was broadcast live by the three major na-

[1] The Black Congressmen of the U.S. House of Representatives are also known and organized under the name of "Black Caucus." The Black Caucus members filing this complaint are the following thirteen members of the United States House of Representatives: Hon. William L. Clay (Missouri), Hon. Shirley Chisholm (New York), Hon. George W. Collins (Illinois), Hon. John J. Conyers, Jr. (Michigan), Hon. Ronald V. Dellums (California), Hon. Charles C. Diggs, Jr. (Michigan), Hon. Walter E. Fauntroy (District of Columbia), Hon. Augustus F. Hawkins (California), Hon. Ralph H. Metcalfe (Illinois), Hon. Parren J. Mitchell (Maryland), Hon. Robert N. C. Nix (Pennsylvania), Hon. Charles B. Rangle (New York), and Hon. Louis Stokes (Ohio).

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tional television networks (ABC, CBS and NBC). Petitioners contend that "Although the President chose to discuss a number of important and controversial issues, he remained notably silent on the serious national problem of institutional racism against black and other minority Americans." Petitioners state that they are uniquely qualified to speak on the issue of racial problems in that they represent approximately 3,400,000 black Americans; that they won their seats by large voting margins; and that they comprise all of the black Congressmen in the House of Representatives.

3. Petitioners state that they requested the three national television networks to accept and broadcast a pre-taped or filmed documentary over which they would exercise complete control of content and format, but were refused that opportunity due to network policies which exclude all documentaries and other programming which discusses controversial issues and which is not produced and controlled by the network.[2]

Petitioners claim that:

they could not adequately perform their representative function as elected Congressmen of the United States unless they were allowed to speak periodically and directly to their constituents and all citizens of the country, in their own words free of network editorial supervision.

Petitioners therefore ask that the Commission:

(1) Rule that the three television networks' policies of categorically barring access to the facilities they control for programming produced by members of Congress, addressed to important and current national issues of the day, is fundamentally arbitrary, irrational, and unsupportive of the "public interest," contrary to the "separation of powers" doctrine in Articles I and II of the Constitution, contradicted by the fairness doctrine obligations in the Communications Act of 1934, and violative of the basic freedoms of expression in the First Amendment;

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[2] Petitioners wrote the three major television networks on January 22, February 16, and May 3, 1971 and requested free time to reply to the President's January 22, 1971 State of the Union message. Congressman William L. Clay, on behalf of his black colleagues in the United States House of Representatives, wrote the three networks on January 22 and requested reply time to present the views of the Black Caucus on the "State of Affairs" of black Americans. Mr. Clay stated: "On the basis of the Fairness Doctrine as outlined by the Federal Communications Commission, we request equal and comparable time . . ." ABC, CBS, and NBC refused his request on the basis that they had already broadcast contrasting points of view to those expressed by President Nixon in his State of the Union message. ABC stated that on January 27, 1971 it presented a special one-hour reply to the President, featuring Senate Majority Leader Mike Mansfield. CBS, according to petitioners, claimed that its offer of time to the Democratic Party exhausted its obligation to provide reply time and that issues raised by the Black Caucus would be covered in CBS news and information programs. NBC stated that it had broadcast contrasting views to the President in NBC news, interview, panel discussion and special programs.

On February 16, 1971 petitioners again sent letters to the three national networks requesting time. This request included the argument that Congressmen should have a limited but significant right of access to network programming, and that this right of access should accrue to them "even if the President had never delivered his State of the Union address." Petitioners based their request for direct access on the First Amendment and the separation of powers concept in the U.S. Constitution. The networks again refused petitioners' request for time.

Petitioners on May 3, 1971, following meetings with CBS and ABC, wrote to the networks and requested that they broadcast a program "produced and supplied to the network by the Black Caucus, which would devote itself to the problems of racial minorities in this country." ABC and CBS again refused this request. ABC, in a letter dated May 21, 1971, stated that ". . . ABC will not accept documentary programs dealing with controversial issues which are not subject to the editorial supervision and control of ABC News." In a May 20, 1971 letter, CBS stated that broadcasts dealing with current controversial issues will be produced under the direction and control of CBS News. NBC stated that "NBC News produces a weekly half-hour series called 'Comment' . . . The format of the program provides for 'direct and unfiltered speech . . .'" NBC suggested that the "Comment" program could be used to present the views of the Black Caucus. However petitioners interpreted this reply to be a rejection of their request, in that the "Comment" program is produced and controlled by NBC in most respects.

(2) Issue a declaratory ruling that the three national television networks must make available an appropriate number of prime time hours each year, generally comparable in amount to the time given members of the Executive Branch, for direct unfiltered political speech under the exclusive control of elected representatives of the Congress, including Senators and members of the House of Representatives, and should fairly apportion that access time among leading spokesmen or groups of spokesmen on current issues of national importance; and

(3) Order the three national television networks either to make available to complainants a half-hour or full-hour of network programming time, free of charge, to present a message of their own choosing, on racial and other issues, or to show cause why complainants are not the appropriate Congressmen to speak directly to the nation on a topic over which they exercise complete content control, and in a format of their own choosing.

4. Petitioners state that television networks do not have to accept all requests by Congressmen for air time, but contend that networks should not be allowed to extend to the President unconditional prime time access while allegedly categorically rejecting all such requests for time by Congressmen on the basis of a policy that rejects programming not initiated and controlled by the networks.

5. Petitioners base their complaint and request for declaratory ruling on (1) the separation of powers concept in Articles I and II of the Constitution, (2) the fairness doctrine and (3) various First Amendment arguments. Regarding separation of powers, petitioners contend that the networks have impaired the power of Congress to function as an equal and coordinate branch of government by giving the President a right of access whenever he chooses to address the electorate but denying members of Congress the same opportunity. Petitioners state that the inability of Congressmen to converse with their national constituency has destroyed the "delicate balance" of power created by Articles I and II of the Constitution and has diminished the power of the legislative branch to such a degree that it may be unable to "check and balance" the power of the President. Petitioners quote from Senator Fulbright's testimony before the Subcommittee on Communications of the Senate Committee on Commerce, 91st Cong., 2nd Sess., Aug. 4, 1970:

> Communications is power and exclusive access to it is a dangerous, unchecked power . . . As matters now stand, the President's power to use television in the service of his policies and opinions has done as much to expand the powers of his office as would a constitutional amendment formally abolishing the co-equality of the three branches of government.

6. Petitioners also interpret Article I, Section 5, Clause 3 of the Constitution, which requires each House of Congress to keep a permanent journal of its proceedings, as suggesting "that the Framers imposed a constitutional *duty* on the Congress to communicate with its electorate." Petitioners assert that a policy denying them access to the media prevents them from fulfilling their Constitutional duty to communicate with their constituency. Petitioners conclude that the Constitutional requirement for open communications between Congress and its constituency can be fulfilled only by granting Congressmen periodic, direct access to the facilities of network television.

7. Petitioners also contend that the fairness doctrine requires a limited right of Congressional access to the broadcast media. Peti-

tioners state that the fairness doctrine requires licensees affirmatively to cover controversial issues of public importance, and that the doctrine provides more than a mere right of rebuttal to a licensee's own editorial speech. Petitioners cite the Commission's 1949 *Editorializing Report*, 13 F.C.C. 1246 (1949), as imposing on licensees an affirmative duty to seek out concerned spokesmen on new and important issues and give them the opportunity to initiate debate, over and beyond their obligation to make available on demand an opportunity for the expression of opposing views. Petitioners contend that licensees should, in part, serve as moderators between competing spokesmen on important issues, and not merely present all viewpoints themselves. Petitioners state that a licensee would fulfill its fairness obligations by making an appropriate number of opportunities available for self-initiated and produced programs and by preserving a rough balance between the self-initiated views of the speakers. Petitioners assert that, in the case of the President, licensees are obligated by the fairness doctrine to cover some speech which he initiates. Therefore, petitioners conclude, licensees must afford a comparable opportunity for self-initiated speech by members of Congress. Petitioners state that licensees do not have complete control over access and have been required to provide direct personal access under the fairness doctrine or one of its corollaries [3] to specific individuals who then have substantial control over the content and format of the presentation.

8. Petitioners argue that the First Amendment guarantees them a limited free right of access to network television to communicate their message in any mode or format they choose. Petitioners contend that the networks have created a national forum for communication and, once having opened it to the President and themselves, cannot arbitrarily and selectively close it to Congressmen. Petitioners state that the First Amendment prohibits governmental action "abridging the freedom of speech"; that political speech is involved in this controversy; and that the "documentary" mode of speech is often considered the most effective form of television and is entitled to full First Amendment protection. They contend that petitioners' speech is being abridged by a network policy which prohibits them from broadcasting any program dealing with a controversial issue of public importance which is not produced and controlled by the networks. Petitioners state that *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969) and *Business Executives Move for Vietnam Peace* v. *F.C.C.*,[4] —— U.S. App. D.C. ——, —— 450 F. 2d 642 (1970), cert. granted —— U.S. —— (1972), stand for the idea that the actions of broadcast licensees are so impregnated with government character as to become subject to the Constitutional limitations placed upon state action. Petitioners state that First Amendment analysis of "access" to a speech forum is generally conducted by balancing the interests of speakers in reaching an

[3] See Section 315 of the Communications Act of 1934, as amended, Section 73.123 of the Commission's Rules, and *Nicholas Zapple*, 23 F.C.C. 2d 707 (1970).

[4] Petitioners note that the Court in *BEM* delineated three First Amendment rights of the public which attach to the broadcast forum: (1) the public has an important right to receive a full range of ideas and information on important and controversial subjects, (2) the public's interest in the mode or manner—as well as the content—of public debate aired on the broadcast media, and (3) the interest of individuals and groups in effective self-expression.

audience through the forum in question, against the importance of other speech and non-speech forum uses, and the extent to which they may be disruptive. Therefore, petitioners conclude that any policy initiated by an institution imbued with governmental character, which prohibits all outside produced programs dealing with controversial issues, must be voided, absent some strong national policy or compelling interests which would justify it.

9. With respect to balancing the interests in the present case, petitioners contend that the three national networks have available 3,834 prime time hours per year and that relinquishing a small fraction of such time would not significantly impair or disrupt respondents' normal operations. Petitioners argue that political speech is worthy of the highest First Amendment protection. Petitioners also stated that they have a strong interest in communicating their views to the electorate. Petitioners argue that restricting petitioners to short news clips, interviews or political debates does not provide them with an adequate opportunity to express their views. Petitioners acknowledge the broadcasters' First Amendment interest in the news and documentary programs they produce, but state that most network programming is produced without the supervision and control of the networks and that the networks perform more of an "allocative" than a "speech" function in choosing between programming drawn from independent or outside sources. Petitioners state that the limited right of access will not subject the networks to significant disruptive burdens. Petitioners contend, therefore, that their interest in being given a limited right of access outweighs any competing interest of the broadcaster in that same time.

10. ABC and CBS rejected petitioners' request for free time to broadcast a documentary initiated and produced by themselves on the basis of their stated policy against the broadcast of any program dealing with a controversial issue which is not produced or controlled by the network itself.[5] NBC, while also refusing to grant petitioners' request, based its refusal on the fact that it already had presented contrasting views on the topics the petitioners wished to discuss. NBC did not base its rejection on any stated policy against the broadcast of documentary programming which is not produced or controlled by NBC. NBC stated:

> In fact, NBC did not take the position that its facilities were barred to programming produced by members of Congress, and . . . attached correspondence bears this out. NBC has presented a number of programs over the years, on both a paid and sustaining basis, in which members of Congress were given access to NBC facilities to present programming, the substantive content of which was "produced" by members of Congress. In fact, at NBC's invitation, members of the Black Caucus participated in a program in which NBC's production and control was limited to furnishing the studio equipment, production personnel and identifying the speakers—in effect the substantive content was "produced" by the participants.

NBC further stated:

> That the First Amendment applies to broadcasting is not in dispute. Nor do we dispute that it protects the complainants' right of free speech. There is no question that complainants may exercise this right in a program, documentary or

[5] See footnote 2.

otherwise, which they themselves produce and distribute to interested broadcast stations and CATV systems.

Petitioners did not view the NBC answer as responsive to their request for free time to broadcast a documentary produced by them and concluded that "It remains unclear, therefore, whether NBC rejected complainants' request on policy grounds, or on the merits of their specific request."

11. All three networks in their March 20, 1972 reply state that the petitioners' request for a right of Congressional access should be denied by the Commission. On grounds other than the fact that the broadcasts would be produced by the petitioners, the three networks note that petitioners did not allege that the networks violated the fairness doctrine by failing in their overall programming to present opposing views to the President's State of the Union message. The networks state that the exceptions to licensee discretion in selecting spokesmen are specifically prescribed in the Commission's Rules and Section 315 of the Communications Act and that the networks need not give any specific group or individual "access" unless it falls within one of these exceptions. Regarding the separation of powers argument, the networks state that petitioners failed to cite any reference to the Constitution, applicable statutes, regulation or case law supporting their contention that the Constitutional concept of separation of powers requires a right of access to television. The networks reject petitioners' argument that the Constitutional requirement for Congress to keep a journal should be interpreted to mean that Congressmen have a constitutional directive to communicate on the broadcast media to their electorate. The networks state that the journal requirement is really a requirement that Congress record its activities, not a directive to communicate in the media.

12. The networks state that petitioners' contention that the fairness doctrine requires Congressional access is inconsistent with both the Commission's and the court's interpretations of communications law, and that the fairness doctrine should not be reconstructed so as to transform its focus from an issue-oriented to a spokesmen-oriented doctrine. The networks state that a similar right of access was rejected by the court in *Democratic National Committee* v. *CBS, Inc.*, —— U.S. App. D.C. ——, —— F. 2d —— (decided February 2, 1972, Case Nos. 71–1637 and 71–1723) (hereinafter *DNC*). The networks state that the Commission has consistently held that licensees must have sufficient control as to format, spokesmen and scheduling in order to insure that the public is adequately informed. The networks also reject petitioners' First Amendment arguments, stating that the Amendment should not be used as a weapon to carve out a personal right of access of Congressmen. The networks claim that petitioners' right of access would hinder rather than foster public debate and therefore it would become increasingly difficult for the networks to further the First Amendment goal of preserving an uninhibited marketplace of ideas. The networks also reject petitioners' use of *BEM*, *supra.*, to uphold their Constitutional arguments. The networks contend that *BEM* dealt only with time relinquished by brodacasters to others (i.e., commercial time), in which broadcasters have no strong First Amendment rights. The networks

contend that since licensees do not as a regular practice relinquish any program time to outsiders and there is a strong First Amendment interest of broadcasters in non-commercial speech, *BEM* does not apply to this case.

13. Petitioners, in reply to the opposition of the three networks, contend that a Congressional right of access to the media will not create unworkable administrative burdens. Petitioners state that the networks have the skill and expertise to determine what Congressmen and what points of view should be broadcast. Petitioners note that the networks have always made such judgments in determining what to cover and who should appear on their network news interview programs. Petitioners argue that their request will not be an intrusion on the traditional journalistic role of the broadcaster, in that the licensee still will be able to exercise discretion concerning what stories to cover and what spokesmen to broadcast. Petitioners assert that the documentary is one of the best techniques for educating the mass television audience and that the networks have failed to state why they find it important and necessary to broadcast only documentaries produced and controlled by themselves. Further, petitioners state that the *DNC* decision which the networks relied upon to argue that the fairness doctine does not require Congressional access is inapplicable to the present proceeding. Petitioners also state that their request would not interfere with network control over their own documentary programming. Petitioners conclude "that, at most, members of the public would be exposed to additional programming—programming not subject to the editorial supervision and control of the networks."

14. The National Committee for an Effective Congress (NCEC) submitted comments to the Commission on May 15, 1972 in support of petitioners' request for a Congressional right of access to the media. NCEC states that the "powerful medium of television has increasingly become the sole preserve of the Executive Branch for the promulgation and defense of its policies." NCEC contends that if Congressmen are not given the opportunity to utilize television, ". . . a dangerous imbalance in communications power will exist, which will increasingly distort the functioning of a system based on 'separate but equal' branches of government." NCEC states that the "Speech and Debate Clause" [6] and the requirement that Congress maintain a journal indicate that Congress has a duty to communicate its view to the people. NCEC states that the language of the Constitution of necessity must be read to reflect the technological developments of the 20th century. NCEC concludes that if the President is given a right of access to communicate to the people whenever he wishes, the spirit and intent of the Constitution require that the same privilege be afforded members of Congress.

DISCUSSION

15. We shall consider initially petitioners' contention that the fairness doctrine requires a limited right of Congressional access to the

[6] Article I, Section 6, Clause I of the United States Constitution states in part that Senators and Representatives ". . . for any speech and debate in either House, . . . shall not be questioned in any other place."

broadcast media. (See paragraph 7 for petitioners' arguments.) Petitioners do not state that the networks have failed to fulfill their fairness responsibilities regarding racial issues in the United States; rather they argue that they as a group should have specific access to discuss the matters over and beyond any network's fairness doctrine obligation to present contrasting views on controversial issues. Petitioners assert that just as the networks cover some of the President's self-initiated speech, so must they afford a comparable opportunity for self-initiated speech by members of Congress.

16. The broadcast system which Congress established has been fully described in such landmark decisions as *National Broadcasting Company* v. *U.S.*, 319 U.S. 190 (1943) and *Red Lion Broadcasting Co. Inc.* v. *F.C.C.*, *supra*. This system was based upon the unique nature of radio, in that "unlike other modes of expression, radio inherently is not available to all. Because it cannot be used by all, some who wish to use it must be denied." *NBC* v. *U.S.*, *supra* at 226. Congress created a system of licensing private entities for short terms, and made it incumbent upon them to operate their facilities in the public interest. As the court stated in *Red Lion*, *supra*, at p. 394, licensees are ". . . given the privilege of using scarce radio frequencies as proxies for the entire community, [and are] obligated to give suitable time and attention to matters of great public concern."

17. The Commission has consistently stated that, with some exceptions not applicable to this case, the licensee has discretion in discharging his public interest obligation. The Commission in its Editorializing Report stated:

> It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests of time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. . . .

That policy has been reiterated in the Commission's 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416, and its 1960 *Programming Statement*, 25 Fed. Reg. 7291 (1960). As we stated in *In re Democratic National Committee*, 25 F.C.C. 2d 216 (1970):

> In line with these general precepts we have consistently held, in case after case, that with certain exceptions not here involved, no individual has a right to express his particular views by means of a broadcast facility.

18. It is clear that the fairness doctrine is issue-oriented. The Supreme Court in *Red Lion*, *supra*, has stressed the right of the public to be informed—not the right of the broadcaster or any individual or group to speak over broadcast facilities. The Commission has consistently rejected the claims of groups and individuals requesting a specific right of access to broadcast facilities. *In re Committee for Fair*

Broadcasting, et al., 25 F.C.C. 2d 283 (1970), and *The Committee of One Million*, 33 F.C.C. 2d 545 (1971). Only in a few well-defined situations do particular individuals or groups have the right to use a licensee's broadcast facility.[7] As indicated above, the fairness doctrine gives licensees wide discretion in selecting what issues to broadcast and what spokesmen to present. As we stated in *The Committee of One Million* at p. 548:

> The Commission's consistent policy, now under review, has been that licensees must have adequate control to insure that the public will be reasonably informed, and that the assertion of a right of access is incompatible with the overriding right of the public to hear all substantial sides of an issue, particularly in view of the licensee's duty to present an opposing viewpoint without charge if that is necessary to insure that a conflicting viewpoint is not denied a hearing. We read *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969), as being consistent with our position and, indeed, as rejecting a personal right of access.

In this regard, the Commission in *Matter of Complaint of the Senate of the Commonwealth of Puerto Rico*, —— F.C.C. 2d —— (decided October 12, 1972)[8] and *In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, First Report in Docket 19260, FCC 72-534, June 22, 1972, —— F.C.C. 2d ——, has rejected all arguments that the fairness doctrine be extended to require a licensee to provide a comparable opportunity for opposing spokesmen to comment on the issues raised in a broadcast appearance of any public official, including the President. Thus, we reject petitioners' contention that the fairness doctrine requires a right of Congressional access to the broadcast media.

19. In addition to the fairness doctrine, petitioners rely in their complaint on the separation of powers concept of Articles I and II of the Constitution, contending that the networks have impaired the power of Congress to act as an equal and coordinate branch of government by giving the President free access while denying members of Congress the same opportunity. They state that the actions of the networks have diminished the power of the legislative branch to such a degree that it may be unable to "check and balance" the President. Petitioners further assert that a policy that denies them access to the media prevents them from fulfilling their constitutional duty to communicate with their constituency—a duty they infer from the requirement of Article I, Section 5, Clause 3, that each House of Congress keep a permanent journal of its proceedings.

20. However, the constitutional concept of separation of powers does not, in our opinion, justify the conclusion that the Constitution requires a right of special access to broadcast media for members of Congress. The Constitution does not command such communication, and the Constitutional prerogatives and powers of Congress remain intact without it. Nor do we believe that the requirement that a journal be kept justifies a conclusion that a constitutional mandate exists for

[7] See Section 315 of the Communications Act of 1934, as amended, regarding "equal opportunities"; the personal attack and political editorial section of the Commission's Rules (Section 73.123); and *Nicholas Zapple*, 23 F.C.C. 2d 707 (1970).

[8] See paragraph 7 of the Commission's decision.

the allocation of nationwide radio or television time to members of Congress. Although we agree that the broadcast media are essential to proper communication with the public, we find nothing in the pleadings before us to justify the novel interpretation of the Constitution here advanced. We note in this regard that the Court of Appeals, in rejecting the Democratic National Committee's request for a right of reply to Presidential addresses, *Democratic National Committee et al* v. *FCC*, 460 F. 2d 891, 905 (D.C. Cir. 1972), stated

> We are not unsympathetic to the plight of the party out of the White House but sympathy cannot be allowed to deter the public from the maximum information it can obtain. One of the primary sources for public information concerning the national and its welfare is from the Presidential broadcast. While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond in the opposition party.

21. Petitioners also argue that the First Amendment guarantees them a limited free right of access to network television to communicate their message in any mode or format they choose. In *Business Executives' Move for Vietnam Peace*, 25 FCC 2d 242 (1970), the Commission was asked to decide whether a licensee's flat ban against accepting paid commercial announcements which contained a discussion of a controversial issue was against the public interest and violated the First Amendment. The Commission held that stations were not obligated to sell time to the complaining group (BEM) to present paid commercial announcements against the United States policy in Vietnam; that a flat ban policy against accepting paid commercial announcement did not *per se* violate the fairness doctrine or any other Commission policy; that *Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, *supra*, did not support BEM's contention that a flat ban violated the First Amendment rights of BEM's spokesman; that the licensee had furnished suitable access to the public on the ideas which BEM wished to express; and that a licensee is not a common carrier and need not sell or give time to everyone seeking it. At the same time that BEM reached the Commission, the Democratic National Committee (DNC) sought a declaratory ruling to the effect that a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as DNC, for comment on public issues and for solicitation of funds. The Commission in *Democratic National Committee*, 25 FCC 2d 216 (1970) held that licensees need not sell time to any individual or group for comment on public issues, because no particular individual or group has a right to express its particular views by means of a broadcast facility.

22. The BEM and DNC decisions were appealed and the Court of Appeals considered both cases together. The Court did not consider

the solicitation of funds aspect of the DNC complaint. The Court reversed the Commission in BEM and DNC in *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, 450 F. 2d 642 (D.C. Cir. 1971), and held that:

> . . . a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. We do not hold, however, that the planned announcements of the petitioners or, for that matter, of any other particular applicant for air time must necessarily be accepted by broadcast licensees. Rather, we confine ourselves to invalidating the flat ban alone, leaving it up to the licensees and the Commission to develop and administer reasonable procedures and regulations determining which and how many "editorial advertisements" will be put on the air.

23. However, on February 28, 1972, the Supreme Court granted the Commission certiorari and also stayed the mandate of the Court of Appeals in *BEM*, 450 U.S. 953 (1972). In view of the fact that the issue of a First Amendment right of access is now pending before the Supreme Court, we will not re-examine that issue here.

24. Aside from their assertion of a right of access, petitioners argue that the networks' policy of excluding controversial issue programming produced by others is contrary to the public interest. This is one of the many questions which will be considered by the Commission in its current inquiry *In the Handling of Public Issues Under the Fairness Doctrine, etc., supra*, and we believe that it may be more appropriately considered in the context of that inquiry than on an ad hoc basis in this case.

25. While the Commission recognizes the potential of television to influence public opinion and the advantages a President traditionally has in gaining access to the broadcast media, to attempt to carve out a special right of access for either Congressmen or the President would be contrary to the communications system established by Congress and to all Commission precedent, and adoption of such a requirement would go far toward making licensees act as common carriers, which is contrary to congressional intent. See Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. 153(h). See discussion, par. 16. Again, one of the most fundamental principles of broadcast law is that ideas, rather than any person or group, must be given access to the broadcast media. If Congress, however, decides that the public interest requires it to establish a specific right of access for Congressmen, it may of course, do so by statute. In fact, a proposal for direct Congressional access to broadcast facilities was initiated by Senator William J. Fulbright during the 91st Congress, but expired in the Senate Subcommittee on Communications upon the adjournment of the 91st Congress. Senator Fulbright's Senate Joint Resolution 209 proposed that Section 315 of the Communications Act of 1934, 47 U.S.C. § 315 (1964) be amended by the addition of the following subsection:

> (d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year.

26. Accordingly, and for the reasons set forth above, we find that no action by the Commission is warranted at this time, and the complaint of the Black Caucus IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

[Re: Availability of Network Programing Time to Members of Congress]

and

[Re: Complaint of the Black Caucus of the U.S. House of Representatives]

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Wright—Miami Daily News

'The President and I are happy to announce that the Justice Department has broken the vicious network monopoly over TV programing. Stay tuned for an hour of martial music followed by a stirring two-hour discussion by the Secretary of Agriculture'

Newsweek, January 15, 1973

The questions presented by these cases and rejected by the Commission majority today are of enormous consequence to the continuance of our delicately balanced system of democratic government. Since the majority does not seem to appreciate the significance of its inaction in the face of these complaints, I feel constrained to spell out at somewhat greater length than usual what I perceive to be the policy considerations involved.

I

Although the two complaints before us differ on a few minor points, they are sufficiently alike in major considerations that I have chosen to discuss them both within the format of a single statement.

The request of the Fourteen Members of Congress was that the three networks would "sell, or otherwise make available" to them a certain amount of time so that they might "inform the public and seek the public's guidance with respect to contemplated Congressional

action concerning American involvement in the Indochina War." The Fourteen also had as their object the presentation of "a contrasting viewpoint to that of the Administration"—e.g., that of "a substantial number of members" of Congress.

The members of the Black Caucus sought three things: a) a ruling that the networks' flat ban on running editorially uncontrolled documentary programming was, as applied to the members of Congress, "arbitrary, irrational and unsupportive of the public interest;" b) a directive to the networks to provide "an appropriate number of prime time hours" each year, generally comparable in amount to that given the Executive branch, for "direct, unfiltered political speech" regarding the important issues before Congress; and c) one half hour or one full hour for themselves, in order that they might respond to what they considered Presidential misconceptions about the role government should play in areas of domestic importance, based upon the President's 1971 prime time "State of the Union" address.

Both complainants cited basic Constitutional justifications for their requests, including the Separation of Powers doctrine found in Articles I and II, as well as First Amendment considerations. In addition, they cited the "public interest" standard by which this Commission is required to regulate broadcast licensees.

The networks refused to honor the requests of either complainant,[1] citing a variety of reasons for their refusal. NBC, for example, argued that "the appropriation and use of privately owned broadcast facilities" such as was allegedly "contemplated" here was simple "too extraordinary" a remedy for the problems complainants outlined. CBS rejected the requests because of what it called an "inappropriate" abdication of licensee journalistic discretion, and argued that "nowhere in the Constitution is the press required to maintain the balance of power." NBC added that "if the framers had intended to require the press to provide equal time, they would have said so in the Constitution."

In addition, all the network respondents sought to claim that the operative factors were the issues sought to be discussed, rather than the actors, and each stated categorically that they had satisfied their general fairness doctrine requirements with regard to those issues. Finally, each respondent noted in passing that, while the President was the President of us all, the members of Congress involved in this complaint represented but a few of the "535 discrete constituencies" that go to make up Congress—and were therefore not entitled to anything approaching "equality" of consideration with the Executive Branch.

The majority dismisses both complaints with little more than an echo of the network arguments. They "defer" a decision on all First Amendment access aspects of the case until after the Supreme Court decides BEM. *Business Executives' Move for Vietnam Peace v. F.C.C.*, 450 F. 2d 642 (D.C. Cir. 1971), cert. granted and mandate stayed, 405 U.S. 953 (1972). The remainder of the issues are swept away with a

[1] NBC apparently sought a compromise with the Fourteen Members of Congress, but pulled back when the instant complaint was begun.

brief note that none of the Constitutional arguments are in the least compelling, that neither the "fairness doctrine" nor the "public interest" require any licensee to sell or give time to "particular groups or individuals" for the discussion of controversial issues, and that if Congress should desire any such right of "access" as is sought here, it should pass a law to get it.

I find the majority's approach a simplistic insult to the integrity of our system of government, that takes into account neither the public interest standards under which this Commission is supposed to operate nor the delicacy of a 200 year old balance of Constitutional power currently under the "siege" of potential Executive tyranny. Accordingly, I dissent.

II

It was recognized as far back as the years of chaos that preceded the Radio Act of 1927 that mankind had stumbled upon a revolutionary new technology in over-the-air broadcasting that would irrevocably alter the pattern of his existence. Viable, instantaneous mass communications can leave no institution in our country unchanged, and least of all the institutions of our Federal government.

It is absurd to maintain, as most broadcasters do, that the television medium should be no more regulated by the Federal government than other media. The "regulation" of a "privately-owned" broadcast media was the method chosen by that government to allocate a finite number of broadcast airwaves for which there was far greater demand than supply. The method chosen was not the "sale" of those airwaves to the highest bidder, but their assignment, on behalf of the public, to "trustees" who would operate their frequencies "in the public interest, convenience or necessity," 47 USC § 309(h), in exchange for being allowed to make commercial profits from their use.

From the beginning, the government's decision not to operate the airwaves itself, but through such public trustees, has resulted in a misunderstanding by the broadcasters regarding the extent to which they "should" be regulated, on First Amendment grounds as well as others. They have consistently denied any difference between themselves and all other media, and when they have grudgingly admitted to some required degree of governmental control, it has only been in the face of adverse rulings fought by them to the highest administrative or judicial level practicable.

Industry apologists have often noted ruefully that there seem to be "two traditions of freedom of speech in this country." See, e.g., Kalven, "Broadcasting, Public Policy and the First Amendment," 10 Journal of Law & Economics 15 (1967): ". . . [W]e all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication . . . [H]ow dismal the position of broadcasting is today. It is cut off from partnership in a great American tradition of freedom." *Id.*, 16–17.

Yet it is not without considerable reflection that we continue to do such "dishonor" to the traditional First Amendment prerogatives of

one branch of the "press." Access to broadcast media is limited because it is a scarce resource. Trite as that assumption can be made to sound by industry spokesmen (see e.g., Testimony of John Summers, General Counsel of the National Association of Broadcasters, before the Subcommittee for Government Regulation of the Senate Select Committee on Small Business, February 7, 1973), it is at the very basis of the regulation embodied in the Communication Act of 1934 and has been cited approvingly in Court decisions ever since. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, at 226–227 (1944).

This scarcity of resources, plus the method developed for allocating them to private groups or individuals, has caused concern from the very beginning of governmental regulation that *all* dimensions of the First Amendment be protected in over-the-air broadcasting. Even before the passage of the Radio Act of 1927, Herbert Hoover, then Secretary of Commerce, was saying:

> Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listeners only option is to abandon his right to use his receiver. Freedom cannot mean a license to every person or corporation who wishes to broadcast his name or his wares, and thus monopolize the listener's set . . . the greatest public interest must be the deciding factor.

Address, cited in Proceedings & Recommendations for Regulation of Radio 56–57 (1926). That sentiment was echoed by the Supreme Court the first time it attempted to construe the Act, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, at 475 (1940), and later Courts merely served to underscore the fact that the "differences" between the "new" technological media and the older varieties must of necessity lead to different applications of First Amendment rights. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Kovacs v. Cooper*, 336 U.S. 77 (1949). Finally, the Court in *Red Lion* drew the existing authority together as unequivocal justification for the premise that:

> [b]ecause of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others *whose views should be expressed on this unique medium.* But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. 395 U.S. 367, at 390. [emphasis added]

Moreover, the *Red Lion* Court added another dimension to the "scarcity" argument when it recognized that "broadcast technology . . . supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news . . ." 395 U.S. at 386, n. 15, thus emphasizing that the protections we require might be grounded as much in the potential for abuse of this ability to reach vast numbers of Americans as in the scarcity of its frequencies.

That such a potential for abuse exists and must be recognized is at the basis of the public interest arguments that cannot be so easily dismissed in the cases before as today. The overwhelming importance and influence—and consequent potential for harm as well as good—of a strictly limited number of broadcast media in a country with more

than 200 million people *cannot* be mere idle conjecture, as some commentators would have us believe. See, e.g., Jaffe's scornful treatment of the premise that "the potential of TV for good and bad is enormous," in "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 *Harvard Law Review* 768 (1972). It cannot be denied that a very large percentage of the American public currently gets *all* its news and *all* its public affairs information from television and radio, and it is simply impossible to ignore the significance of recent data which tells us that TV viewing is "running at an all-time high of about 7 hours per American home per day." Television Bureau of Advertising, citing statistics of the A. C. Nielson Corp., quoted in *The Washington Post*, *Parade Magazine*, February 18, 1973, at 13.

Although we are constrained by the Courts not to rely on the holding of the decision in BEM, there is nothing faulty about the reasoning in Judge Wright's dictum that the broadcast media "function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment. That can be said of almost no other 'private' enterprise." BEM, at 654.

III

Included in the license of every broadcaster is the condition that the operation of his station be carried out in the "public interest." 47 U.S.C. § 309(h). The Supreme Court has more than once indicated that "[t]his mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive' . . . whose validity we have long upheld." *Red Lion*, *supra*, at 380, citing *National Broadcasting Co.*, *supra*, at 219. In *Red Lion*, the court held the standard clearly "broad enough to encompass these [fairness doctrine] regulations," *Id.*, and the clear implication of these cases and others is that the public interest requirements, at least potentially, are considerably broader. See, e.g., *Alexandra Mark v. F.C.C.*, —— F. 2d —— (1st Circuit C.A. Decision No. 72–1158, October 19, 1972), in which the Court said

> * * * it cannot be seriously contended, in light of the limited number of broadcast frequencies available, that general guidelines reflecting programming priorities may not reasonably be adopted. The Communications Act's requirement that stations operate in the "public interest" furnishes the framework within which the First Amendment would apply, such that activities or policies of a broadcaster, if valid under the Act, would normally also meet the constitutional standard.

In *Mark* the Court of Appeals considered an NBC "flat ban" against a certain type of programming in light of whether such a "ban" might "illegally preclude programming which falls within the 'public interest,' " *Id.* Because the programming ban involved dealt with matters such as astrology and fortune telling, the Court came to the conclusion that the "public interest" standard was *not* violated. But the Court implied that over and above the strict issue-oriented confines of

the fairness doctrine, the public interest must be a major consideration when we deal with the violation of the constitutional rights of listeners and speakers.

There is no doubt in my mind but that Congress has given this Commission the power *and* the mandate, via the public interest standard, to cope with the urgent need for some form of Congressional access. Section 303(b) of the Communications Act reads as follows:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest or necessity requires shall—
> (b) Prescribe the nature of service to be rendered by each class of licensed stations and each station within any class;

The grant of power found in this section in fact gives this Commission the right to act, not only in the very narrow area of Congressional access, but in a wide range of other areas as well. That the FCC has chosen time after time to refuse to regulate the Communications industries should in no way be allowed to reflect on the Congressional foresight apparent in the Act.

The fact is, despite the decision made some 40 years ago to allocate such a huge chunk of spectrum to local systems of broadcasting to serve the citizen in his community, this Commission has never once promulgated a single rule or standard regarding the amount or quality of informational programming that would satisfy the public "convenience, interest or necessity," even though it would easily have been possible to do so without infringing on *any* of the prerogatives of the licensee with regard to programming he's originated himself. See, e.g., the studies made by Commissioner Cox and myself in *An Oklahoma Case Study*, 14 F.C.C. 2d 1 (1968); *New York State License Renewals*, 18 F.C.C. 2d 268 (1969); and *Renewal Standards: The District of Columbia, Maryland, Virginia and West Virginia License Renewals*, 21 F.C.C. 2d 35 (1969). This Commission was established by Congress to develop the special expertise required to cope with the evolving power and subtleties of communications, in areas social and political as well as technological. See Justice Frankfurter's oft-quoted statement that "the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." *National Broadcasting Co., supra*, 215–216. Yet despite even the glowing judicial articulations of the scope and effectiveness of Commission regulatory power, the sad fact remains that we have never really gotten around to fleshing out the rules and standards to which the American public, by virtue of § 303(b), are entitled.

This lack of a positive, aggressive approach to the development of a sound body of "public interest" regulation actually permeates all areas of Commission activity. I am appalled to note, as I look back at nearly seven years as a member of this body, that the various majorities with which I've served have never taken a single tiny step forward when they could justify a great leap backward, especially in response to some publicly-originated argument that the "public interest" would be served by a given Commission action (or inaction). I am tired of quibbling over definitions like "the public interest is what interests the public" at this stage of my tenure. American Telephone and Telegraph

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does not represent the public interest. Neither do NBC, CBS or ABC, other multiple broadcast owners, or even the rapidly growing CATV conglomerates. These corporations are not set up to represent any constituency but their stockholders, and indeed no rational person or governmental entity would expect them to operate otherwise. It was this Commission which was established to add the element of *public interest* regulation to the purely business deliberations of our private communications enterprises. Via such *public* representation it was plainly envisaged that many of the policies and activities of the corporations—planned solely for their maximum profit potential—would be vigorously examined, and perhaps held in check, by process of governmental regulation. That was seen as the acceptable compromise between complete government ownership on the one hand, and auctioning off the frequencies to the highest bidder (or otherwise dispensing full-blown *property* rights) on the other.

Why is it, then, that this Commission decides 95% or more of its cases along lines totally compatible with corporate, not public, plans and policies? When the Commission has seen fit to approve of policies including as many as 33 minutes of commercials per hour,[2] including up to $47,000 of outright fraud,[3] including a planned zero minutes of news or public affairs programming,[4] including zero effort on the part of a licensee to comply with even our most *specific* political and editorial fairness rules,[5] including gross violations of our rules or policies against technical interference,[6] multiple ownership,[7] regional concentration,[8] or employment discrimination,[9] what tattered shreds are left of the "public convenience, interest or necessity?"

Moreover, it is in those areas involving the public right to receive information that this Commission has fallen most perfectly into step with the industry it purports to regulate. Areas like fairness, equal time, political access, or personal attack see the majority fighting back every anti-industry attack with an intensity normally reserved for partisan advocacy. The complaints procedure is simply a remedyless joke before this Commission, with never more than a tiny handful of the many thousands of complaints filed every year given even the remotest chance of success. And despite the fact that fairness citations are supposed to be considered at the time a broadcaster's license comes up for renewal, only the most blatant and consistent offenders have ever been cited or placed into hearing for fairness *or* other programming violations.

I don't paint this bleak picture of FCC abdication frivolously. I mean to demonstrate that when the entire fabric of this Commission's regulation of broadcasting is considered, these Congressional access

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Wherever possible, the citations for these examples are to FCC decisions in which I have prepared a written dissent:

[2] *Accomack-Northampton Broadcasting Co.*, 8 F.C.C. 2d 357 (1967);

[3] *WKKO, Inc.*, 24 F.C.C. 2d 889 (1970);

[4] *Herman C. Hall*, 11 F.C.C. 2d 344 (1968);

[5] *Letter to Thomas M. Slaten*, —— F.C.C. 2d —— (November 8, 1972); *Letter to People's Party (Dr. Benjamin Spock)*, 38 F.C.C. 2d 316 (1972);

[6] *WHLN, Anderson, Indiana*, —— F.C.C. 2d —— (Dec. 14, 1972);

[7] *Assignment of WDSU–TV to Cosmos Broadcasting Co. of Louisiana*, —— F.C.C. 2d —— (November 29, 1972);

[8] *Muskegon Heights Broadcasting Co.*, —— F.C.C. 2d —— (January 23, 1973); *Assignment of Station WNVL*, 21 P & F Radio Reg. 2d 77 (1971);

[9] *Pennsylvania-Delaware Renewals*, 28 F.C.C. 2d 158 (1972).

decisions, despite an importance so disproportionate to their narrow scope, should have been as predictable as they are wrong. For I serve on a Commission whose standards are no standards, whose administrative policies are the non-policies of avoidance and deference, and whose members are quite simply frozen into public interest timidity by their long years of see-no-evil, hear-no-evil, speak-no-evil decision-making.

IV

In regard to the question of general access to the airwaves to rebut the President (or some other chief executive officer) this Commission has done little but apply the strictures of the fairness doctrine to the issues of each case. Thus, the licensee has been allowed to retain his discretion to choose the spokesman and format of the presentation of any or all opposing views. The Commission has found, for example, that speeches and presentation of views on controversial issues by a non-candidate President, or by a candidate President who was nevertheless making "bona fide news," should be broadly covered by the fairness doctrine despite the existence of "equal time" provisions in the Communications Act. *Letter to Blair Clark*, 11 F.C.C. 2d 511 (1968), *Republican National Committee*, 3 P & F Radio Reg. 647 (1964). See also *California Democratic State Central Committee*, 20 P & F Radio Reg. 809 (1960), in which the Commission said that "a speech alleged to be political should be considered in the light of whether it involves a discussion of controversial issues of public importance. If it does, then the station has an obligation to afford reasonable opportunity for the presentation of opposing views." The only real requirement placed on the broadcaster in any of these cases has been that the "selection of a spokesman be reasonable in terms of the points of view or issues to be discussed." *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404, 406 (1962). Indeed, the Commission has ruled so broadly and ambiguously on the issue of the right of the general public to rebut the President (or other executive) that, in this area as well, "reasonableness" standards appear to have been virtually eliminated. See, e.g., *Boalt Hall Students Association*, 20 F.C.C. 2d 612 (1969), in which a group of law students at the University of California/Berkeley were refused time by a number of stations to reply to blasts by Governor Ronald Reagan aimed directly at student unrest on their campus.

The problem of the right of the "loyal opposition" to reply to a Presidential speech or appearance has been handled by the majority with equal dispatch. See, e.g., *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970), in which the Commission found again that no specific opposing group had any right to respond to Presidential addresses. I concurred in that case because we also decided that five successive prime-time Presidential addresses on the topic of the War did, in fact, require some sort of redress. But I disagreed with the decision that various of the parties to that action did not have additional rights where such a plethora of Administration presentations were concerned, and especially the various groups

of U.S. senator/complainants, even though they were claiming their rights as Democrats rather than as Members of Congress.

It is *Committee for Fair Broadcasting* upon which the majority would rely in both cases today, and it is not very difficult to demonstrate that their reliance is misplaced. The bald statement that "neither the public interest nor any Congressional enactment requires licensees to sell time to particular groups for discussion" utterly fails to take into account the peculiar, limited set of facts we confront in these complaints. For we deal today, not with yet another "group" of concerned citizens or "loyal opposition," but with two complaints on behalf of Congress, the Legislative branch of our government, against unequal and highly discriminatory treatment, by the broadcast media, of another, coequal branch.

It is absurd to attempt to shoehorn the Congress into the same category as all other groups requesting access, paid, free or otherwise. The rights of Congress are, and must be, different from any other such group, including the political parties whose members serve in its two chambers. The rights of Congress, as the branch of government charged with the most direct responsibility to the American electorate, are (or should be) designed most easily to effectuate that responsibility. To that end, members of Congress have been granted special privileges denied virtually every other member of the public They are freed from the burden of prosecution for many crimes committed on the floor of the House or Senate. They are given powers of subpoena to allow access to any person or document deemed necessary to the legislative process. They are even given power to cite individuals for contempt and to mete out penalties to those who would thwart that process.

The Congress also has many obligations to the American people, not the least of which is the obligation, via communications, to contribute to the understanding and comprehension necessary for an informed electorate. That obligation is specifically manifested in the clause of the Constitution requiring the Congress to keep a Journal, and also in the Speech and Debate clause. Either clause would justify the Constitutional grant of a special right of Congressional access to the airwaves, yet the former is merely dismissed by the majority as a frivolity, and the latter is never mentioned at all. Nevertheless, the important rights sought by complainants today transcend even the specifics of these Constitutional provisions.

Even more compelling, for example, is the argument based on the broad Constitutional need to maintain a healthy separation of powers between the two coequal branches. It is that need which most certainly triggers the "public interest" standard of broadcast regulation when one branch so threatens to dominate the airwaves as does the Executive today. Acting within a vacuum, to be sure, it might be more difficult for us to justify an administratively-created right of "special access" for Congress alone. But complainants are not demanding any right for their branch of government that have not already been granted, on numerous occasions, to the Executive. It is nothing less

than the equal protection of Congress, within the parameters of the First Amendment interests of the public, that is being sought before us today. If indications of current Executive media manipulation are any guide (see § V below), we deny it at our peril.

The "no particular group" reasoning, then, simply ignores the heart of these complaints: that, while this access might not be necessary in and of itself to the orderly procedures of government, the current situation, in which the Executive branch has demanded and received an *automatic* right to uncontrolled access, is so serious as to require immediate relief from the agency Congress originally set up as arbiter of the uses of the broadcast media.

The majority claims it cannot decide the First Amendment aspects of this case until such time as the Supreme Court has acted in BEM, *supra*. But BEM is really only on point to the extent to which the broadcaster here could justify his refusal to sell time to the complainants in *Fourteen Members of Congress*, which request was not, in fact, at the heart of that complaint. BEM concerned itself primarily with the First Amendment rights of broadcasters vis a vis the allocation of time whose content was *already* allocated to others—i.e., a wide range of commercial product advertisers. The Circuit Court found there were not nearly so compelling First Amendment broadcaster interests over advertising time as there might be vis a vis time over which the broadcaster is expected to exercise professional judgment. "In normal programming time, closely controlled and edited by broadcasters," the Court said, "the constellation of Constitutional rights would be different." 450 F 2d, at 654.

It is ostensibly that "normal programming time" not considered in BEM which is at the root of these complaints, and which distinguishes them from the situation in BEM. The "time" involved here, however, relinquishes all claim to "normalcy" by the "constellation" of rights and protections surrounding it. Where a "forum" is opened up within that programming time for unfettered, unfiltered political speech by one branch of our Government, but an equal measure denied to another, it remains, not for this Commission to have to constitutionally justify *its* action, but for the broadcasters to have to constitutionally justify their resulting denial of "equal protection." [10]

Even the "flat ban" issue in this case is different from the "ban" against political advertising in BEM and can be decided by reference to the principles before us today. That is, the networks' ban against programming they do not editorially control must *also* be tempered by the equal protection First Amendment obligations to Congress

[10] I've discussed the relation between the concepts of "forum" for First Amendment purposes, state action and the right of access to the airwaves in great detail in other contexts. See, e.g., my dissent to the original FCC decision in BEM, 25 F.C.C. 2d at 253–264. See also N. Johnson and T. Westen, "A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time," 57 Va. L. Rev. 574 (1971).

As for the applicability of "equal protection" principles, we need not apply the holding of the Court in BEM to agree with its conclusion, in a different hypothetical context (i.e., that of the discrimination among speakers based on the content of their speech), that "since the First Amendment rights have been held to be 'fundamental rights' triggering the strict standard of equal protection principles, *Williams* v. *Rhodes*, 393 U.S. 23, 30–31 (1968), it is doubly clear that the burden of justifying any apparent discrimination is very great indeed." 450 F. 2d, at 666.

created by the carriage of editorially uncontrolled programming of the Executive branch. [11]

Nor should it be of any importance that there is a potential administrative problem involved with the grant of a right of access to a Congress numbering 535 members. The presence or absence of administrative niceties simply does not justify a continued breach of constitutional obligation. The right sought by petitioners on behalf of Congress is not a large one, either procedurally or in terms of encroachment upon broadcaster prerogatives. At most, Congress is said to be entitled to an amount of unfettered speech approximately equal to that afforded the President, which, with a minimum of guidelines could be granted to Congress for its own determination as to content and format. In the absence of any other suggestions, however, the requests of the complainants in these two cases are by no means unreasonable, and must be granted.

In the end, the narrowness of the questions presented by this case, plus the "reasonableness" of the actions of the licensees, must mandate a decision on behalf of petitioners. The only question we need answer today is a severely limited one, *not* whether we could constitutionally order all our licensees to adopt some far-reaching scheme of Congressional access (and force it, as the majority implies, on the State governments as well), *not* whether it is our duty not to act in an area in which Congress has not specifically spoken, *not* whether we are to force the broadcasters to relinquish all editorial control over their programming, but rather simply whether the particular actions complained of in this instance, given the nature of the parties involved, *were reasonable actions taken by the licensees in the public interest*. Given the free range of unfettered Executive prerogative, was it *reasonable* to refuse access to members of Congress to discuss their conflicting views on the delicate issues surrounding the Indochinese War? Was it *reasonable* to refuse the request of members of the Congressional Black Caucus that they be allowed, in a format of their own choosing, to refute the assessment of the Executive, in a format of *his* own choosing, of the goals and priorities of our domestic policy? Given the tremendous power of our broadcast media, I think no rational administrative body could answer in the affirmative.

V

We are not dealing in this complaint with the network- or licensee-controlled "access" via news coverage or public affairs programming of Executive versus Legislative views and opinions, but of a very specialized, self-initiated, self-controlled right of access open to one but

[11] Indeed, for the networks or individual licensees to claim at this late date the right to maintain ironclad initiative and editorial control over the entirety of their programming not only denies the strictures of the Supreme Court that "supervised and ordained discussion" insufficiently satisfies the requirements of the First Amendment, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), but it also denies the realities of a broadcasting situation in which all local stations, and even the networks themselves, rely on outside "producers" to pre-package, not only commercials, but also entertainment shows and even certain types of documentary. As two examples of the latter, I would refer the network respondents to the Alistair Cooke "America" series of documentaries (on NBC) and the Jacques Yves Cousteau underwater documentaries (on ABC). This latter point raises, I think, a somewhat different set of equal protection problems than the more obvious carriage of editorially uncontrolled Administration productions.

not the other. The networks, in their response to these complaints, have chosen to defend their activities by implying that the President, simply because he is one man elected nationally, deserves the higher level of immediate access to the minds of his "constituency"—because he "represents all Americans and administers rules and policies which generally have universal effect." (page 16, Response of American Broadcasting Co., Inc. to "Complaint . . . of Fourteen Members of Congress.") The fallacy is that the President, because he "administers" the laws passed by the Congress, requires a greater access to the public than Congress—whose duty is "only" to formulate those laws.[12] No account is taken in this argument of the perhaps greater need of the American public to know what its government is doing or thinking at the Congressional stage—where, once informed, they can then communicate their thoughts and predilections to that Body via their own elected representatives.

The networks challenge the complainants as well because they purport only to be "members" of Congress, and thus do not represent "Congress" as a whole, but rather their own specialized constituencies. Yet even though the Fourteen Members of Congress who are prosecuting *one* of these complaints hail from States with a combined population exceeding 91 million (according to the 1970 Census), the complaints are being prosecuted more *on behalf of Congress* than on behalf of any individual minority group. Even the Black Caucus views its particular right to respond *within* a right belonging to Congress, not exclusive of it.

That Congress requires this specialized, limited right of access is as much a function of the nature of our current system of broadcasting as it is of its great potential for one-sided governmental abuse.

Despite the original decision to allocate the airwaves on a *local* basis, so that each broadcaster could mold and adapt himself to the needs and interests of the community he was to serve, television broadcasting has developed into a virtual monopoly for just three separate corporate entities who program many hours of the day on a nationwide basis. Such a mode of operation is not entirely without its good points, either, including the potential ability to apply vastly larger sums of money than the local stations to achieve a higher quality of entertainment, news and public affairs programming. In a few instances, indeed, that potential has even been realized.

With the advent of the networks, however, has also come the even greater potential for abuses of the informational process. Not the least of those abuses has been the firm establishment of a right of self-originated, self-initiated Presidential access.

The right of the President to seize the airwaves at will for "important announcements" to the American people is at the very base of these two Congressional complaints, and a profoundly dangerous base it is. For, like every other aspect of communications "regulation" that has any teeth, it is a product of some other, more powerful, force—i.e., that of our nation's Chief Executive.

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[12] Indeed, if Presidential television communications had been limited to merely informing the public of the nature of administrative rules, so that they might be more easily administered, there would in all likelihood have been no need for these complaints.

The media has had a tremendous effect on the powers and prerogatives of the Executive Branch, an effect that grows larger every year. This has been the case since the days of Roosevelt's "fireside chats," as this quote from one of the most respected early commentators should demonstrate:

> A prepared address is the customary way of conveying the President's considered thoughts to the people through the newspapers. But a speech requires a listening audience—not just newspaper readers the next day—and before the advent of radio, audiences did not come easily . . . The radio has changed all this . . . A statesman at last had what he had always needed—a direct road from his mind to the minds of millions, open for use almost the moment his thoughts were matured. Chafee, *Government and Mass Communications* 726–727 (1947).

The current Chief Executive, having surrounded himself with advisors heavily steeped in the mechanics and significance of the broadcast media, has been almost uniquely aware of the potential of mass communications and able to take advantage of it to its fullest potential. I took the occasion some time ago to document this President's use of the media in a speech, in which I summarized as follows:

> What emerges is the overwhelming impression of an Administration whose fixed focus is on the little glass screen, beginning with the media campaign of 1968. President Nixon surrounds himself with advisers whose principal experience is in advertising, public relations, and broadcasting; his appointments to the Federal Communications Commission and related agencies are designed to foster Administration control and industry orientation. The full panoply of governmental power—including the Vice President, the Justice Department, the Federal Trade Commission, the FCC, the Pentagon, and other agencies—is available to use on the broadcasting industry in an unprecedented attack on a government-licensed medium. An office of "Director of Communications" is established in the White House to survey the media and coordinate the attack. Broadcasters are kept off-balance by the one-two punch of barely camouflaged intimidation and acts of censorship, together with the promise of an economic pay-off for those who cooperate. President Nixon goes to the airwaves with Administration propaganda and does not hesitate to seek to exploit commercial television as a channel for Administration ideology. The FCC is involved in restricting the access of non-governmental groups to TV, and legislation designed to place limitations on campaign financing is vetoed for what appear to be partisan reasons. Finally, television as a medium is abused and exploited as never before in the 1970 congressional election campaign. "Government by Television: A Case Study, Perspectives and Proposals," remarks prepared by Commissioner Nicholas Johnson for delivery to the International Association of Political Consultants 3rd Annual World Conference, The Royal Garden Hotel, London, December 14, 1970. Reprinted in *Earth* Magazine, Vol. 2, No. 2, March, 1971.

Even so, it is perhaps less than candid to blame any single President for the ever-increasing imbalance in the power of the branches of our government to effectively utilize communications. All the forces at work, it seems, would tend to favor *any* Chief Executive who has the political foresight to make good use of that imbalance. Perhaps too, as Senator Mike Mansfield has said, it is Congress itself that is mostly to blame for "abdicating its power to the Presidency in the nuclear age." *Washington Post*, January 21, 1973, p. C–7.

The sad paradox of the opposition of the broadcasters themselves, who would rise up in unanimous outrage against any resolution of these cases in favor of Congress, is that they simply don't realize the precariousness of their position under the current "status quo" of

unequal protection of Congress. Quite frankly, this Commission has taken great pains to render itself powerless to act in the face of any further growth in Presidential intimidation of the broadcast press. Even those who defend the broadcast industry against what they would call the double standard of "two traditions" of First Amendment freedoms admit that "one embarrassment in attacking seriously the topic of free speech in broadcasting is that the admitted benignity of the FCC has made it difficult to mount appropriate indignation. Whatever the posture of the theory, in practice things are not at all bad and broadcasting does not live under a shadow of government tyranny." Kalven, "Broadcasting, Public Policy and the First Amendment," 10 *J. Law & Economics* 15, 19 (1967). But while the potential "tyranny" of the FCC may be a joke, the retention of the current communications imbalance in favor of the Executive branch of government may well be paving the road to a tyranny that is not to be taken so lightly.

VI

The ultimate irony of these decisions lies not in the broader implications of rights of access found in the lower Court's decision in BEM but in their implications for the very heart of our governmental processes, the delicate separation of powers that for so long has sustained our method of government and made it a viable democratic alternative. There is an elliptical thought process involved in the considerations of the majority in these two cases: "We would defend the rights of our licensees to refuse to give time to the President," it says, "therefore we must defend the refusal of a right of access to Congress."

We operate in the eighth floor meeting room of the FCC building, located some seven blocks from the White House and some two miles from the Capitol—in other words in close proximity to the *realities* of government. Why then does reality have no meaning to the deliberations of the majority of the Commissioners? Would any station (or network) in its right mind actually refuse a Presidential nationwide broadcast? Might there be extra-Federal-Communications-Commission sanctions against such a network or station? Yet this Commission operates within its own unique set of policies, and what that works out to most of the time is little more than a vacuum.

Of course, it was probably foolish to expect this Commission to begin to change its approach to regulation with a set of cases as important as this one. The staggering policy implications, the potential importance of this issue to the political future of our system of government, the realities of a situation for which there is no precedent in our Rules or decisions, all these serve to screw even more tightly closed the regulating eyes of the majority.

But I, for one, am worried.

I am worried that the Courts will soon tire under the weight of having to provide this Commission with every major aspect of its regulatory policy. Who is to blame them if they throw up their hands in distress sometime soon, knowing we are wrong, but knowing also that beyond a certain point it is simply impossible for them to go on being a surrogate FCC?

I am worried that the fabric of governmental power is being rapidly gathered, yard by yard, into a heavily guarded four block "combat zone" around the White House, vastly aided by a lumbering hippo of a Congress and reluctant patsies like the FCC. Communications—and especially the artful use of the television seizure—are so important to this process of reeling in the power and influence that I tremble at the paralysis I often see on the faces of my colleagues, both within this Commission and elsewhere in the limbo of administrative government. It is a malignant paralysis, whether voluntary, in order to "get ahead" within the current governmental climate in this city, or involuntary, out of fear of being cast aside.

The arguments made by the majority in this case are a product of that paralysis. The failure of this Commission to acknowledge a right of access to members of Congress (majority and minority alike), either to rebut the President or to present their own proposals, on the grounds that "no individual or group" is entitled to access, indicates that, to the majority, there is no difference between Congress and any other institution in this country. It succeeds, therefore, in setting apart the President as the only legitimate source of federal government, and giving him the sole right to demand and receive instantaneous access for uncontrolled, unfettered pronouncements.

Presently, then, the members of Congress, both collectively and as individuals, must rely upon the news judgment of the broadcasters if they are to receive coverage of their activities, debates, suggestions and opinions. They can, of course, encourage or manipulate such coverage in various ways, a practice in which some have no doubt become artists. Yet the fact remains that the dimension they lack—that of self-initiated programming, used either to inform or convince—is perhaps the most vital element in the governmental communications process.

We are not seeking here to impose upon the licensee's news judgment, or to infringe upon his constitutionally protected right to freedom from censorship of the content of *his* programming. Nor do we purport to set up massive blocks of time for Congress (or its minority contingents). One hour per month of prime time, spread out among the three networks on a rotating basis—so that each network would be required to find only one hour every three months in its nightly schedule—could well satisfy everyone who would wish for a greater Congressional right to inform the American public. The permutations and alternatives are, of course, endless. Surely no one can claim that such a Congressional right would "open the door" to the ultimate demise of the independence and profitability of the broadcast media.

In these cases we are dealing with the whole galaxy of First Amendment protections of the broadcaster, the viewer and the speaker alike—all of which are directed toward one major goal: the "uninhibited, robust, wide-open debate" the Supreme Court found at the base of the First Amendment in *New York Times v. Sullivan*, 376 US 254, 270 (1964). See, e.g., the D.C. Court of Appeals' application of that principle to the administration of the airwaves in *National Association of Theatre Owners v. F.C.C.*, 420 F. 2d 194, 207 (D.C. Cir. 1969). But if "uninhibited" debates are to take place in the regulated broadcast

media, it is simply impossible for one party (the President) to have unlimited access to that media, while his opponent (the Congress) must have all his presentations controlled and edited by a third party (the broadcasters). Yet if no right of balanced access for unfettered, uncontrolled speech is to be found even at the highest levels of our federal government, the concept that the "public" is owner of the airwaves, and that the "public interest" should dictate their use, can have no meaning at all vis a vis the Constitutional rights of the speaker and the listener.

It makes a mockery of our Constitutional scheme if we believe that the First Amendment is satisfied by the double standard inherent in the treatment accorded our Executive and Legislative branches of government by the networks and licensees in these cases. The Commission majority is wrong in finding Congress to be no different from any other "particular group or individual," and it is wrong when it decides the actions of the networks in these cases were "reasonable" or consistent with the "public interest."

I dissent.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

The three American television networks, ABC, CBS and NBC, have refused to honor a request, presented to them by the Black Caucus of the United States House of Representatives (hereinafter, "Black Caucus") for time in which to present their views, and indeed the views of their unique constituency, *the Black American populace*, on one of the most urgent issues besetting this country—the race issue. This refusal has, unfortunately, reaffirmed one thought that permeates the minds of many Black folks, i.e., that the system is diametrically opposed to anything which can be categorized as Black-oriented.

Through their programming, the networks—and hence the individual stations—daily inundate the public with their selective choice of spokesmen to expostulate on the multiple aspects of "the racial issue."

The Black Caucus request serves to highlight perfectly the principal point I have been reiterating in speeches and discussions ever since accepting appointment as Commissioner: namely, that while the individual licensees generally do a creditable and commendable job of programming, and the networks provide us with frequently superb coverage of events in inimitable fashion, the public is mostly deprived of the opportunity to hear and see Blacks (and Blacks' viewpoints) at variance with media-reinforced stereotypes of Black citizens.

It is presumptuous on the part of white media executives and news editors—particularly in view of the fact that the establishment broadcast hierarchy is virtually devoid of Blacks in any meaningful roles in editorial and programming decisions—to believe that they can better convey to the public black views on controversial issues than can the Black Caucus. Illustrative of this unseemly hauteur are the responses of ABC and CBS to the Black Caucus. The president of ABC declaimed:

> We believe that *our* professional news organization is more objective and has the responsibility and competence to devise the programming to accomplish this

end, including the selection of appropriate format and spokesmen. (Emphasis supplied)

CBS similarly rejected the notion that the Black Caucus might more proficiently disseminate Black political viewpoints than it by asserting:

It has been our policy for many years—that broadcasts dealing with current controversial issues will be produced under the direction and control of CBS News. . . .

Inasmuch as the Black Caucus complaint is also grounded in the Fairness Doctrine—which seeks antagonistic viewpoints—ABC's claim of objectivity is clearly inapposite. Objectivity is nearly antithetical to the purpose of affording a Fairness Doctrine (discussed *infra*) response and certainly irrelevant to the thrust of the Black Caucus request.

Therefore, the out-of-hand refusal on the part of the networks to provide a platform—a platform the Black Caucus could not duplicate short of purchasing broadcast facilities themselves—by which the American public could receive invaluable information, as I have said before, cannot but reinforce in the minds of some Black citizens that there still exists an insidious effort to squash the Black upward movement. In my mind, the unwarranted refusal to the Black Caucus raises suspicions about the *bona fides* of the broadcasters in either defusing race problems (riots on aircraft carriers make good, exciting copy) or in offering the public the best possible information. That is my, shall we say, emotional dissent.

From a legal standpoint the networks' refusal to the Black Caucus is a clear violation of virtually every public interest standard embodied in the Communications Act and the Commission's various program policies. We proceed from the bedrock premise that broadcasters are licensed to serve the public interest [1] as trustees of the communal radio spectrum.[2] Pursuant to their statutory obligations, and putting aside Fairness Doctrine [3] questions momentarily, a licensee must heed the following Commission admonition:

If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them; *it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for expression of opposing views.* (Emphasis supplied). *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1251 (1949).

The 1949 *Editorializing Report* language hereinabove cited dispels any doubt that the broadcaster has an independent obligation to furnish the public with useful and stimulating programs so as to encourage "uninhibited wide-open" [4] debate on public issues. In terms of serving the public interest, that tenet is the keystone.

[1] 47 U.S.C. Sections 307, 309.
[2] *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969).
[3] See fn. 9, *infra*.
[4] *Red Lion Broadcasting Co.* v. *F.C.C.*, *supra*, at 390 (citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 290 (1964).

In the face of such premonishment, how then can a broadcaster refuse to transmit to the public—increasingly dependent on television for information—the important positions of the premier conclave of Black political thought on racial issues? Licensees, as public trustees or good journalists or whatever, have a compelling duty to elicit such views when available. Here, though available on a silver platter to a public with a First Amendment right to be informed of all views on controversial issues of public importance,[5] the networks have arbitrarily withheld such information from the American public on the fallacious (and supercilious) ground that *they* must edit and control what the public hears about controversial issues.

That licensees cannot serve the public interest while at the same time excluding the citizenry from exposure to the unadulterated views of the President and other important government officials is implicit in the 1949 *Editorializing Report*, supra, wherein we said:

* * * * * * *

This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been affirmed by this Commission in a long series of decisions.

* * * * * * *

And the Commission has made clear that in such presentation of news and comments, the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise.

* * * * * * *

These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the public. (Id. at 1247, 1249 and 1250).[6]

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[5] Id. Moreover, in connection with this Constitutional right, it is impossible to square the following *Red Lion* language with the network positions set forth in their responses.

> . . . That the right of free speech of a broadcasters . . . does not embrace a right to snuff out the free speech of others . . . [A] licensee has no constitutional right . . . to monopolize a radio frequency to the exclusion of his fellow citizens. . . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . *Red Lion, supra*, fn. 3, at 387, 389, 390.

[6] See, *Democratic National Committee*, —— F.C.C. 2d ——, 22 R.R. 2d 727 (1971); aff'd, *sub. nom., Democratic National Committee et al. v. F.C.C.*, —— U.S. App. D.C. ——, —— 460 F. 2d 891, 905 (D.C. Cir. 1972), wherein the Court of Appeals said:

> One of the primary sources of public information concerning the nation and its welfare is from the Presidential broadcast. While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer, it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is, he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and as this obligation exists for the good of the nation. . . .

But see, *Columbia Broadcasting Co. v. F.C.C.*, 147 U.S. App. D.C. 175, 177, 454 F. 2d 1018, 1020 (D.C. Cir. 1971) wherein the Court of Appeals noted:

> . . . [I]n the distallation of an informed public opinion, such [Presidential] appearances play a very basic role. But if the words and views of the President become a monolithic force, if they constitute not just the most powerful voice in the land but the only voice then the delicate mechanism through which an enlightened public opinion is distilled, far from being strengthened, is thrown dangerously off balance. Public opinion becomes not informed and enlightened, but instructed and dominated.

The Black Caucus occupies a distinct role for which there is no comparable partisan or non-partisan amalgam and should receive coverage. Because of their individual and widely-diverse backgrounds, they have welded together a composite view, if indeed such view collectively exists, of the needs and aspirations of a multiplicity of constituencies within the Black national community. It has fused, consolidated and condensed positions which bespeak of all black interests. The Black public—and perhaps more importantly, the white public—should be permitted to see the Black Caucus, in popular parlance, "do its thing" in a way that no pale imitation from the best-intentioned broadcaster can approximate. To categorically, and self-righteously, deny a paltry few prime time hours out of the hundreds annually available for the discussion of one of the nation's critical problems from the representatives of the group most concerned—the Black electorate is more than *prima facie* inconsistent with the public interest.

Turning to the Fairness Doctrine [7] aspect of the Black Caucus complaint, let me say that I fully recognize that in light of its limited nature, the spectrum cannot be made available to all who wish to use it. *National Broadcasting Co.* v. *F.C.C.*, 319 U.S. 190 (1943). I also understand that the Fairness Doctrine is issue oriented and cannot require an identical treatment of all differing views because, as Judge Wilkey stated in *Green* v. *F.C.C.*, 144 U.S. App. D.C. 353, 358, 447 F. 2d 323, 328 (1971) "this would place an unreasonable burden on the licensee" and that "licensees may exercise their judgment as to what material is presented and by whom." [8] Moreover, in the exercise of this judgment, we have succinctly held:

> The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. *Letter to Mid-Florida Television Corp.*, 40 F.C.C. 620, 621 (1964).

The issues in the instant Fairness complaint are thus sharply drawn: (1) In response to the Chief Executive's unedited, carefully prepared views on controversial racial issues of public importance, did the networks act unreasonably in denying a response from the Black cadre of the Legislative Branch? (2) Can the networks be said to have acted reasonably and in good faith in denying time for contrasting views to the most appropriate spokesmen? [9]

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[7] The Commission's Fairness Doctrine, skeletally framed, requires a broadcaster to afford a reasonable opportunity to qualified spokesmen to present contrasting viewpoints on controversial issues of public importance. See, 47 U.S.C. Section 315(a). See also, *Obligations of Broadcast Licensees Under the Fairness Doctrine*, —— F.C.C. 2d ——, 35 F.R. 7820 (1970); *In the Matter of the Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 33 F.C.C. 2d 800 (1972). *Applicability of Fairness in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 2d 598, 29 F.R. 10415 (1964).

[8] Judge Wilkey means, of course, that such judgement must devolve from the good faith exercise of reasonable standards by the licensee. See *Applicability of Fairness Doctrine*, *supra*, fn. 9, at par. 10; also see *Neckritz* v. *F.C.C.*, 446 F. 2d 501 (9th Cir. 1971).

[9] The 1949 *Editorializing Report* (*supra*, fn. 5, at 1251, 1252) stated: In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoints of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups of individuals who might be more appropriate spokesmen for the particular point of view than the person making the request.

There is no way the networks can, at once, comply with those criteria and respond in the negative of the Black Caucus request.

As the court stated in *Columbia Broadcasting Co.* v. *F.C.C.*, *supra*, fn. 7, *supra*, 147 U.S. App. D.C. at 191, 454 F. 2d at 1034:

> **The public must be equipped to make hard choices between competing political philosophies. This end is best served where there is robust debate among the people most directly involved—the spokesmen themselves—not where the operator of a federally licensed facility must circumscribe the debate as a condition precedent to airing it at all.**

For the networks to maintain that some other scattergun approach can fairly match the concerted impact of the State of the Union address with the near effect of the compacted vehicle offered by the Black Caucus is a patently unreasonable violation of the clear meaning of the Fairness Doctrine. The principle that individual proponents, on isolated broadcasts, cannot match the clout of a concerted rebuttal has been acknowledged often by the Commission.[10] But the combined views of the Black populace, as personified in the membership of Black Caucus, is a far cry from the individual views on isolated issues presented to the public by persons they (broadcasters) have caused to be anointed and crowned "Black leaders." I can no more accept the fact that the media-crowned Black leaders speak for the total Black populace than I can accept as fact that a Ku Klux Klansman, college radical, or establishment-type figure can speak individually for the entire white population. Just as political broadcasts on partisan issues by one political party are appropriate for response by the other(s)[11] the Black Caucus, as the major elected voice of the Black community to the Legislative Branch of the government—is the obvious entity to proffer positions on important racial issues and their proper resolution in contradistinction to those views and solutions held by the Executive. The public must hear both; that is the crux of the Fairness Doctrine.

The networks cannot claim that the Black Caucus is demanding time for a cacophony of differing voices which the networks, given temporal limitations, could not accommodate. The Black Caucus has made it simple for the networks. It has consolidated the myriad positions of the nation's Black citizens into a neat package. The appropriateness of the face-off is manifest and the networks, whatever discretionary latitude is accorded them in establishing standards, cannot claim that it can offer better format or spokesmen for the ideological exchange.

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[10] See, e.g., *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970). That decision enunciates the so-called "political party corollary" to the equal time provisions of Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. Section 315. The corollary holds, in general, "That when one political party is given time on the media to use at its discretion a request by an opposing party for time cannot be refused." *Democratic National Committee et al.* v. *F.C.C.*, *supra*, fn. 8, 460 F. 2d at 898. Also see, *Committee for Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970) and *Republican National Committee*, 25 F.C.C. 2d 739 (1970); reversed on other grounds, *sub nom.*, *Columbia Broadcasting Co.* v. *F.C.C. supra*, fn. 8.

[11] Ibid.

By steadfastly clinging to an unyielding discretion in programming choices—even where the Fairness Doctrine limits this discretion—and misapplying their understandable zeal to resist governmental efforts to encroach on programming choices, the networks have, in the balance, come down on the wrong side of the Fairness Doctrine and the public interest.[12]

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[12] In view of the fact that I find that the networks acted improperly on both straight public interest and Fairness Doctrine bases, it is unnecessary to opine on the issue of a Congressional access right to the media. Inasmuch as this issue is presently *sub judice* before the Supreme Court which has granted *certiorari* (405 U.S. 953) in the D.C. Court of Appeals ruling in, *sub. nom., Business Executives Move for Peace* v. *F.C.C.*, Case No. 24492 (D.C. Cir. Aug. 3, 1971) and will review a finding (specifically, *Democratic National Committee*, 25 F.C.C. 2d (1970)) in which I did not participate, it would appear fruitless to here develop my personal views on this matter for the first time.

F.C.C. 73R–136

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS, D.B.A. BURNS, RIEKE AND VOSS ASSOCIATES, IOWA CITY, IOWA	Docket No. 19596 File No. BP–17838
BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA	Docket No. 19597 File No. BP–19134
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1973; Released March 29, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. Before the Review Board is a petition to enlarge issues, filed November 22, 1972, by Johnson County Broadcasting Corporation (Johnson),[1] requesting the Board to add issues to determine whether the applications of Burns, Rieke and Voss Associates (BRV) and Braverman Broadcasting Company, Inc. (Braverman) are consistent with the provisions of Sections 73.24(b)(3)(ii) and 73.37(a) of the Commission's Rules.[2]

2. The Review Board will deny the requested issues on the ground that the matters raised have been previously pleaded and considered by the Commission in its Memorandum Opinion and Order accepting BRV's application for filing, released October 28, 1971, 32 FCC 2d 175. 23 RR 2d 182. While the holding of *Atlantic Broadcasting Co.* (*WUST*), 5 FCC 2d 717, 8 RR 2d 991 (1966), is technically inapplicable because the Commission's action was contained in a document accepting an application for filing, rather than a designation Order, we are of the view that the principles underlying *Atlantic* should apply in this instance. The Commission's Memorandum Opinion and Order, *supra*, contains a "reasoned analysis" of the precise questions now before the Board presented by the same party in the same proceeding,

[1] Johnson, licensee of Stations KXIC–AM and FM, Iowa City, Iowa, was made a party to this proceeding by Order, FCC 72M–1441, released November 21, 1972.

[2] Also before the Board are the following related pleadings: (a) motion for acceptance of petition to enlarge issues, filed November 22, 1972, by Johnson; (b) opposition, filed December 6, 1972, by the Broadcast Bureau; (c) opposition, filed December 7, 1972, by BRV; (d) reply, filed December 14, 1972, by Johnson; (e) letter and attached affidavit, filed February 28, 1973, by Johnson; (f) motion to strike (e), filed March 12, 1973, by the Broadcast Bureau; (g) opposition to (f), filed March 15, 1973, by Johnson. Good cause having been shown for the late-filing of the petition to enlarge issues by Johnson, and no party having interposed objections, the motion for acceptance of same will be granted. The February 28 letter requesting consideration of the attached affidavit is an unauthorized filing and will be stricken. See *Public Notice* No. 90836, released October 11, 1972 (Filing of Supplemental Pleadings Before the Review Board).

109–034—73——4

and addition of the issues requested by petitioner would only undo what the Commission has already done. Moreover, the Board has examined the merits of petitioner's allegations in light of the "new facts and circumstances" it would have us consider, and we find no reason for altering the Commission's prior determination.[3] The requested issues are, therefore, unwarranted.

3. Accordingly, IT IS ORDERED, That the motion for acceptance of petition to enlarge issues, filed November 22, 1972, by Johnson County Broadcasting Corporation, IS GRANTED; and

4. IT IS FURTHER ORDERED, That the motion to strike, filed March 12, 1973, by the Broadcast Bureau, IS GRANTED, and the letter and attachment, filed February 28, 1973, by Johnson County Broadcasting Corporation, IS STRICKEN; and

5. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed November 22, 1972, by Johnson County Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] The question of considering educational stations in assessing existing aural service to a community was discussed by the Commission in paragraph 57 of the recent Report and Order, FCC 73-220, —— FCC 2d ——, released February 28, 1973.

F.C.C. 73R–132

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CALIFORNIA STEREO, INC., SACRAMENTO, CALIF.	Docket No. 19515 File No. BPH–7668
INTERCAST, INC., SACRAMENTO, CALIF.	Docket No. 19516 File No. BPH–7669
EDWARD ROYCE STOLZ, II, TRADING AS ROYCE INTERNATIONAL BROADCASTING, SACRAMENTO, CALIF.	Docket No. 19611 File No. BPH–7924
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 27, 1973; Released March 29, 1973)

BY THE REVIEW BOARD:

1. By Memorandum Opinion and Order, FCC 72–916, released October 19, 1972, the Commission designated the above-captioned applications for a new FM broadcast station in Sacramento, California, for hearing on various issues. Before the Review Board is a petition to enlarge issues, filed by Intercast, Inc. (Intercast) on November 15, 1972,[1] seeking the addition of issues inquiring into the adequacy of the equipment proposed by Stolz and that applicant's financial qualifications.

2. In support of its requests, Intercast contends that a considerable portion of the equipment proposed to be used by Stolz in the operation of his station is equipment he purchased from Station KJML which is outdated,[2] unsuited for the type of operation proposed,[3] and in poor condition.[4] Petitioner further contends that an inventory of the KJML equipment fails to include several items included as assets in Stolz's application, raising a substantial question as to the availability of the equipment.[5] Petitioner maintains that Stolz will have to purchase

[1] Also before the Review Board are: (a) the Broadcast Bureau's comments, filed November 29, 1972; (b) Intercast's reply, filed December 11, 1972; (c) the opposition of Edward Royce Stolz, II, tr/as Royce International Broadcasting (Stolz), filed December 27, 1972; (d) Stolz's petition to accept its late filed pleading (c), filed December 27, 1972; and Intercast's reply to (c), filed January 15, 1973.

[2] Stolz purchased operating property and equipment owned by Station KJML, Sacramento, California, when that station surrendered its license and discontinued operation in July, 1970.

[3] Petitioner maintains that "Station KJML equipment was all monaural and thus wholly unsuited for the quadrophonic operation proposed by Stolz".

[4] Intercast supports these allegations with an affidavit furnished by Logan Waterman, Jr., an engineer who worked for Station KJML, and who, purportedly, was familiar with the station's equipment shortly before the station surrendered its license.

[5] The inventory, a copy of which was filed with Intercast's petition, was prepared for the purpose of appraising KJML's equipment just prior to the time the station's license was surrendered for cancellation.

much of the equipment to remedy these "inadequacies". Since Stolz has a surplus of funds in an amount of only $1,112.00, Intercast argues that Stolz would be unable to purchase all of the needed equipment.[6] The Broadcast Bureau supports petitioner's request for the addition of a financial issue against Stolz, but opposes the addition of the adequacy of equipment issue, contending that Intercast's allegations are speculative.

3. In opposition,[7] Stolz argues that petitioner's requests are predicated on the unwarranted assumption that the equipment purchased from Station KJML will be the equipment used in his proposed station. Stolz contends that he never represented that any of the assets acquired from KJML, other than the studio-transmitter building and tower, would be used in the construction and operation of the proposed station. Furthermore, Stolz maintains, his financial proposal provides for an adequate surplus to cover additional construction costs.[8] Stolz contends that Intercast's request for the addition of a financial issue is based on the same erroneous assumption concerning the origin of Stolz's equipment as was the request for the adequacy of equipment issue. Petitioner, in reply to the opposition, maintains that Stolz fails to respond to its petition by leaving unanswered the questions of whether the equipment he proposes to use will be appropriate for its intended use and whether he has sufficient financial reserves to acquire equipment which is either not on hand or inadequate.

4. The Review Board is of the view that petitioner has raised serious questions regarding Stolz's equipment proposal, and that these questions have not been satisfactorily resolved by Stolz's opposition. Stolz's response that his application contains no representation that he would use any of the equipment acquired from KJML except the transmitter building and tower does not establish the adequacy of his proposal. Thus, on the basis of the pleadings, the Board is unable to determine whether Stolz has the equipment necessary to construct and operate his proposed station, and, if so, whether the equipment is adequate. In order that these serious questions can be resolved, the Board will specify appropriate issues. *Cf. WVOC, Inc.*, 32 FCC 2d 765, 23 RR 2d 371 (1971); *Kittyhawk Broadcasting Corp.*, 8 FCC 2d 839, 10 RR 2d 628 (1967). The Board will not, however, add a financial issue at this time. It is not disputed that Stolz has sufficient funds available to pay for the equipment he now proposes to purchase. If, during the hearing, his equipment proposal is modified, and if such modification affects his financial proposal, the Board would entertain an appropriate request for enlargement.

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[6] Although Stolz proposes in his application to barter some equipment he purchased from Station KJML for remote control equipment, petitioner queries the feasibility of this proposal considering the alleged inferior condition of the KJML equipment.

[7] Stolz's opposition to Intercast's petition was filed December 27, 1972, along with a petition to accept the late filed pleading. Supported by affidavits, Stolz maintains that he did not receive a copy of Intercast's petition until December 6 or 7, 1972, after receiving a copy of the Broadcast Bureau's comments; further minor delays resulted from commitments of counsel. The Board finds that good cause exists for the late filing of the opposition and will therefore accept it.

[8] References in exhibit 14 of petitioner's application regarding a proposal to acquire D.C. remote control equipment by bartering an item purchased from KJML are not significant, according to Stolz, in view of the fact that his application explicitly indicates in section V–B that there would be no remote control location. Therefore, Stolz maintains, petitioner's argument concerning the feasibility of barter is moot. See Note 6, *supra*.

5. Accordingly, IT IS ORDERED, That the petition to accept late filed pleading, filed on December 27, 1972, by Edward Royce Stolz, II, tr/as Royce International Broadcasting, IS GRANTED, and the opposition filed therewith IS ACCEPTED; and

6. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed November 15, 1972, by Intercast, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and that the issues in this proceeding ARE ENLARGED by the addition of the following issue:

To determine whether Edward Royce Stolz, II, tr/as Royce International Broadcasting, possesses sufficient and suitable technical equipment to operate his proposed station and if not, the effect thereof upon the applicant's technical qualifications.

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and proof under the issue added herein SHALL BE on Edward Royce Stolz, II, tr/as Royce International Broadcasting.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-14

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE CHESAPEAKE & POTOMAC TELEPHONE CO., WASHINGTON, D.C. Prescription of Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act of 1934, as Amended	)

ORDER

(Adopted January 4, 1973; Released January 31, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT

1. The Commission having under consideration the matter of modifying, under the provisions of Section 220(b) of the Communications Act of 1934, as amended, certain of the percentages of depreciation prescribed previously by the Commission with respect to each of the classes of property of The Chesapeake and Potomac Telephone Company for which depreciation charges may be properly included under operating expenses;

2. The Commission also having under consideration studies and data covering the service lives of such classes of property and other factors affecting depreciation;

3. IT APPEARING, That notice of proposed rule making and public rule making procedure may be omitted in accordance with Section 4(a) of the Administrative Procedure Act as being unnecessary since (1) the interested State Commission, the District of Columbia Public Service Commission, has been notified of the matter pursuant to the provisions of Section 220(i) of the Communications Act and has offered no objection to the percentages of depreciation set forth in the Appendix to this Order, and (2) The Chesapeake and Potomac Telephone Company has proposed the adoption of these percentages by its letter of November 17, 1972;

4. IT FURTHER APPEARING, That authority for the prescription of the modified percentages of depreciation herein ordered is contained in Sections 4(i) and 220(b) of the Communications Act of 1934, as amended;

5. IT IS ORDERED, That the percentages of depreciation set forth in the Appendix to this Order are prescribed for The Chesapeake and Potomac Telephone Company effective retroactively to January 1, 1972; and

6. IT IS FURTHER ORDERED, That nothing shall be construed herein to amend or rescind that part of the Commission's Order of July 11, 1956 which requires that The Chesapeake and Potomac Telephone Company file with the Commission, until further ordered by the Commission, certain specified information relative to the Company's plans for replacing its central office equipment presently in service with electronic and other types of switching systems.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Schedule of annual percentages of depreciation for the Chesapeake & Potomac Telephone Co.—Effective January 1, 1972

Account No.	Class or subclass of plant	Average service life (years)	Percent net salvage	Percent of depreciation
212	Buildings	41	5	[1] 2.3
221	Central office equipment:			
	Manual	11.3	−7	9.5
	Panel	15.3	−7	7.0
	Crossbar	21.0	−2	[1] 4.9
	Circuit	24.0	2	4.1
	Radio	15.0	5	[1] 6.3
	ESS	38.0	3	2.6
231	Station apparatus:			
	Teletypewriter	8.4	6	11.2
	Telephone and miscellaneous	11.8	1	8.4
	Radio	7.9	2	12.4
232	Station connections	5.5	−11	[1] 20.2
234	Large P.B.X	13.4	4	7.2
241	Pole lines	27.0	−33	4.9
242.1	Aerial cable exchange	24.0	−7	4.5
242.2	Underground cable:			
	Exchange	40.0	8	[1] 2.3
	Toll	40.0	26	1.8
242.3	Buried cable exchange	25.0	0	[1] 4.0
242.4	Submarine cable exchange	25.0	0	[1] 4.0
244	Underground conduit exchange	60.0	−4	[1] 1.7
261	Furniture and office equipment	17.4	12	5.1
	Computer systems	7.0	4	[1] 13.7
264	Vehicles and other work equipment	8.1	10	11.1
	Other work equipment	15.1	0	6.5

[1] Percentage of depreciation has been prescribed previously.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

ATT's property, or "rate base," is valued—by the company—about $50 billion.

Its "rate of return," recently set at an 8½% to 9% level, is paid on that $50 billion (9% would be $4.5 billion).

"Depreciation" is treated as an "expense" item, and goes directly into ATT's $20 billion annual expenses—fully underwritten by consumers.

The "service life" of items of property—sometimes expressed in terms of a "percentage rate of depreciation"—is initially determined by the company. These determinations are then reviewed by the FCC staff, and "approved" by the full Commission.

On the schedules now before us, the "average service life" ranges from 5.5 years ("Account Number 232 Station Connections") to 60 years ("Account Number 244 Underground Conduit Exchange"). The percentage rates of depreciation range (on the same items) from 20.2% to 1.7%.

Obviously, when billions of dollars are involved, a few tenths of a percentage point can make millions of dollars of difference for consumers (and the company).

Nor is that the full impact of depreciation policies. Their principal impact, perhaps, is upon rates of introduction of new technology into a society—and the benefits and costs of alternative rates of introduction.

Take the "touch-tone" activated electronic switching system (ESS) and "picture phones" as examples. Should they be introduced at all? Within 10 years? Forty years? Such decisions will have a tremendous impact—however they are made—upon American business, the family, and many other facets of our economy and social structure. They cannot be avoided merely by failing to address them frontally. They are, then, simply decided by default, but they are decided. Today, for example, we put a life of 21 years on the crossbar switching equipment that ESS is designed to replace. (ESS is assigned a service life of 38 years.)

For the past six and one-half years I have been trying—politely and repeatedly—to get the staff to explain to the Commissioners our depreciation policies, their history, rationale, consequences, and alternatives. For six and one-half years the staff and Commissioners have refused to even meet to discuss these issues. We simply approve, without any discussion whatsoever, whatever the company and staff propose. All agree we do not know what we are doing. On the theory the staff *does*, I have been prepared patiently to concur in these items for some years now. As my patience is now about to expire with my term, I believe this additional example of capitulation to ATT power and resources should be brought to light.

I, therefore, dissent, and will continue to do so until the Commission finally faces up to its responsibility in this area.

F.C.C. 73–15

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
THE CHESAPEAKE & POTOMAC TELEPHONE CO. OF MARYLAND, BALTIMORE, MD.
Prescription of Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act of 1934, as Amended

ORDER

(Adopted January 4, 1973; Released January 31, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT

(For statement see F.C.C. 73–14.)

1. The Commission having under consideration the matter of modifying, under the provisions of Section 220(b) of the Communications Act of 1934, as amended, certain of the percentages of depreciation prescribed previously by the Commission with respect to each of the classes of property of The Chesapeake and Potomac Telephone Company of Maryland for which depreciation charges may be properly included under operating expenses;

2. The Commission also having under consideration studies and data covering the service lives of such classes of property and other factors affecting depreciation;

3. IT APPEARING, That notice of proposed rule making and public rule making procedure may be omitted in accordance with Section 4(a) of the Administrative Procedure Act as being unnecessary since (1) the interested State Commission, the Maryland Public Service Commission, has been notified of the matter pursuant to the provisions of Section 220(i) of the Communications Act and has offered no objection to the percentages of depreciation set forth in the Appendix to this Order, and (2) The Chesapeake and Potomac Telephone Company of Maryland has proposed the adoption of these percentages by its letter of November 28, 1972;

4. IT FURTHER APPEARING, That authority for the prescription of the modified percentages of depreciation herein ordered is contained in Sections 4(i) and 220(b) of the Communications Act of 1934, as amended;

5. IT IS ORDERED, That the percentages of depreciation set forth in the Appendix to this Order are prescribed for The Chesapeake and Potomac Telephone Company of Maryland effective retroactively to January 1, 1972; and

6. IT IS FURTHER ORDERED, That nothing shall be construed herein to amend or rescind that part of the Commission's Order of July 11, 1956, which requires that The Chesapeake and Potomac Telephone Company of Maryland file with the Commission, until further ordered by the Commission, certain specified information relative to the Company's plans for replacing its central office equipment presently in service with electronic and other types of switching systems.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Schedule of annual percentages of depreciation for the Chesapeake & Potomac Telephone Co. of Maryland—Effective January 1, 1972

Account No.	Class or subclass of plant	Average service life (years)	Percent net salvage	Percent of depreciation
212	Buildings	42.0	6	[1] 2.2
221	Central office equipment:			
	Manual	15.4	−1	6.6
	Panel	17.6	−9	6.2
	Step-by-step	15.2	3	6.4
	Crossbar	23.0	2	4.3
	Circuit	25.0	−3	4.1
	Radio	13.3	2	7.4
	Electronic switching	38.0	3	2.6
231	Station Apparatus:			
	Teletypewriter	11.1	2	8.8
	Telephone and miscellaneous	14.6	0	6.8
	Radio	10.4	0	9.6
232	Station connections	8.6	−17	13.6
234	Large P.B.X.'s	15.6	8	5.9
241	Pole lines	25.0	−18	4.7
242.1	Aerial cable:			
	Exchange	26.0	−10	4.2
	Toll	38.0	10	2.4
242.2	Underground cable:			
	Exchange	51.0	0	2.0
	Toll	48.0	15	1.8
242.3	Buried cable:			
	Exchange	28.0	−5	3.8
	Toll	34.0	0	2.9
242.4	Submarine cable	25.0	0	[1] 4.0
243	Aerial wire—Exchange	6.9	−10	15.9
244	Underground conduit	60.0	0	[1] 1.7
261	Furniture and office equipment	26.0	8	3.5
	Computer and AMA systems	5.5	2	17.8
264	Motor vehicles	8.2	7	11.3
	Other work equipment	17.0	0	5.9

[1] Percentage of depreciation has been prescribed previously.

F.C.C. 73-16

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
THE CHESAPEAKE & POTOMAC TELEPHONE CO. OF WEST VIRGINIA, CHARLESTON, W. VA.
Prescription of Percentages of Depreciation Pursuant to Section 220(b) of the Communications Act of 1934, as Amended

ORDER

(Adopted January 4, 1973; Released January 31, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

(For statement see F.C.C. 73-14.)

1. The Commission having under consideration the matter of modifying, under the provisions of Section 220(b) of the Communications Act of 1934, as amended, certain of the percentages of depreciation prescribed previously by the Commission with respect to each of the classes of property of The Chesapeake and Potomac Telephone Company of West Virginia for which depreciation charges may be properly included under operating expenses;

2. The Commission also having under consideration studies and data covering the service lives of such classes of property and other factors affecting depreciation;

3. IT APPEARING, That notice of proposed rulemaking and public rulemaking procedure may be omitted in accordance with Section 4(a) of the Administrative Procedure Act as being unnecessary since (1) the interested State Commission, the Public Service Commission of West Virginia, has been notified of the matter pursuant to the provisions of Section 220(i) of the Communications Act and has offered no objection to the percentages of depreciation set forth in the Appendix to this Order, and (2) The Chesapeake and Potomac Telephone Company of West Virginia has proposed the adoption of these percentages by its letter of November 30, 1972;

4. IT FURTHER APPEARING, That authority for the prescription of the modified percentages of depreciation herein ordered is contained in Sections 4(i) and 220(b) of the Communications Act of 1934, as amended;

5. IT IS ORDERED, That the percentages of depreciation set forth in the Appendix to this Order are prescribed for The Chesapeake

and Potomac Telephone Company of West Virginia effective retroactively to January 1, 1972; and

6. IT IS FURTHER ORDERED, That nothing shall be construed herein to amend or rescind that part of the Commission's Order of July 11, 1956, which requires that The Chesapeake and Potomac Telephone Company of West Virginia file with the Commission, until further ordered by the Commission, certain specified information relative to the Company's plans for replacing its central office equipment presently in service with electronic and other types of switching systems.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Schedule of annual percentages of depreciation for the Chesapeake & Potomac Telephone Co. of West Virginia—Effective January 1, 1972

Account No.	Class or subclass of plant	Average service life (years)	Percent net salvage	Percent of depreciation
212	Buildings	42	2	[1] 2.3
221	Central office equipment:			
	Manual	16.8	−2	6.1
	SXS dial	18.7	0	5.3
	Crossbar	28.0	2	3.5
	Circuit	25.0	−7	4.3
	Radiotelephone	10.0	0	[1] 10.0
	Electronic	40.0	3	[1] 2.4
231	Station apparatus:			
	Teletype	10.0	0	10.0
	Telephone and miscellaneous	16.0	−3	6.4
	Radiotelephone	10.0	0	[1] 10.0
232	Station connections	10.4	−22	11.7
234	Large PBX	15.4	2	6.4
241	Pole lines	24.0	−26	5.2
242.1	Aerial cable:			
	Exchange	30.0	−10	3.7
	Toll	30.0	14	2.9
242.2	Underground cable:			
	Exchange	46.0	−1	2.2
	Toll	33.0	16	2.5
242.3	Buried cable and wire	27.0	0	3.7
242.4	Submarine cable	20.0	0	[1] 5.0
243	Aerial wire	8.3	−16	14.0
244	Underground conduit	60.0	0	[1] 1.7
261	Furniture and office equipment	20.0	7	4.6
	Computer and AMA systems	2.6	9	35.0
264	Motor vehicles	7.5	10	12.0
	Other work equipment	14.0	0	7.1

[1] Percentages of depreciation has been prescribed previously.

F.C.C. 73-342

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REGULATORY AND POLICY PROBLEMS PRESENTED BY THE INTERDEPENDENCE OF COMPUTER AND COMMUNICATION SERVICES AND FACILITIES	Docket No. 16979

ORDER

(Adopted: March 29, 1973; Released: April 3, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. We have under consideration the decision of the United States Court of Appeals for the Second Circuit [1] in which the court, upon judicial review, affirmed our final decisions and rules adopted herein [2] except for subparagraphs (4) and (5) of Section 64.702(c) of the Rules. The mandate from the court was received by the Commission on March 16, 1973 thereby lifting an earlier order issued by the court by which the effectiveness of our decisions and rules was stayed *pendente lite*.

2. We also have under consideration language appearing in the ordering paragraph of our 1971 Final Decision and Order herein (28 FCC 2d 267, at pages 285–286), wherein we specified that certain provisions of our rules would not be effective until after six months from the effective date of our Final Decision and Order.

3. To remove any uncertainty regarding the content and effective dates of our rules, as affirmed by the court, we are hereby re-stating the full text of such rules (omitting the portions overruled by the court) in the Appendix hereto and are specifying herein the effective dates of such rules.

4. Accordingly, IT IS ORDERED, That pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), the rules set forth in the Appendix hereto are effective May 8, 1973, except as expressly set forth in the next ordering paragraph.

5. IT IS FURTHER ORDERED, That, (a) all common carriers providing data processing services, as of May 8, 1973, either directly or through established data processing affiliates, which carriers are not exempted from the provisions of Section 64.702(c) by the application of Section 64.702(b), shall within six months from May 8, 1973 comply fully with the provisions of Section 64.702(c) of the Commission's Rules. All such carriers shall, during this six month period, comply

[1] *GTE Service Corporation et al* v. *FCC et al*, U.S. Court of Appeals, Second Circuit, Slip Opinion, February 1, 1973, Nos. 71–1300 et al.

[2] Final Decision and Order, 28 FCC 2d 267 (1971); Memorandum Opinion and Order (denying petitions for reconsideration) 34 FCC 2d 557 (1972).

fully with all other provisions of our Rules, and shall submit reports every 60 days of progress made toward complete compliance with Section 64.702(c). The initial report shall contain a complete description of the existing or proposed organization, facilities and operations of the data processing affiliate(s), together with copies of all agreements and memoranda or other arrangements between carrier and affiliate(s); (b) any common carrier not furnishing data processing services on the effective date of this Order, either directly or through previously established data processing affiliates, which carrier is not exempted from the provisions of Section 64.702(c) by the application of Section 64.702 (b) of the Commission's Rules, shall not inaugurate such services except in full compliance with our Rules including Section 64.702(c), and shall, within 60 days after it commences such services, submit to the Commission a written report setting forth a complete description of the organization facilities and operations of the data processing affiliate(s), together with copies of all agreements and memoranda or other arrangements between carrier and affiliate(s).

6. IT IS FURTHER ORDERED, That, ITT and RCA, within 30 days from May 8, 1973, shall file tariffs covering their ARX and AIRCON services, respectively.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 0 of Chapter I of Title 47 of the Code of Federal Regulations is amended by the addition of a new § 0.308 in Subpart B to read as follows:

§ 0.308 Authority Concerning Hybrid Services.

The Chief of the Common Carrier Bureau is delegated authority to act upon submissions filed under § 64.702a(e), (f), and (g) of this chapter with respect to proposed hybrid service offerings of common carriers and data processing affiliates of common carriers, and proposed discontinuances by common carriers of communications services.

Part 64 of Chapter I of Title 47 of the Code of Federal Regulations is amended by adding a new Subpart F and new § 64.702 to read as follows:

SUBPART F—PARTICIPATION IN DATA PROCESSING BY COMMUNICATIONS COMMON CARRIERS

§ 64.702 Furnishing of Data Processing Services.

(a) For the purpose of this subpart—

(1) "Data processing" is the use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions.

(2) "Message-switching" is the computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered.

(3) "Local Data Processing Service" is an offering of data processing wherein communications facilities are not involved in serving the customer.

(4) "Remote Access Data Processing Service" is an offering of data processing wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals.

(5) "Hybrid Service" is an offering of service which combines Remote Access data processing and message-switching to form a single integrated service.

(i) Hybrid Data Processing Service is a hybrid service offering wherein the message-switching capability is incidental to the data processing function or purpose.

(ii) Hybrid Communication Service is a hybrid service offering wherein the data processing capability is incidental to the message-switching function or purpose.

(b) Except as provided herein, no common carrier subject, in whole or in part, to the Communications Act shall engage directly or indirectly in furnishing data processing service to others except as expressly provided in paragraph (c) of this section. This prohibition shall apply to all communications common carriers, including Section 2(b)(2) carriers, where any carrier itself has annual operating revenues exceeding $1,000,000 or any such carrier is directly or indirectly controlled by, or is under common control with, another carrier or carriers, and the combined annual revenues of all such carriers exceed $1,000,000.

(c) Except for Companies of the Bell System, common carriers may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnishes data processing service to others provided the following conditions are met:

(1) Each such separate corporation must maintain its own books of account, have separate officers, utilize separate operating personnel, and utilize computing equipment and facilities separate from those of the carrier for its data processing service offerings.

(2) Each such common carrier shall file with the Commission a complete statement of the terms and conditions of every written or oral contract, agreement or other arrangement entered into between such carrier and any such separate corporation within thirty days after the contract, agreement or other arrangement is made.

(3) No such common carrier subject to the prohibition of paragraph (b) of this section shall engage in the sale or promotion of data processing services on behalf of any such separate corporation.

(d) No common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall sell, lease or otherwise make available to any other entity any capacity or computer system component on its computer system or systems which that carrier uses in any way for the provision of its common carrier communications services.

(e) Any common carrier intending to file a tariff respecting a service offering which it considers to be a hybrid communication service shall, at least 90 days prior to the intended effective date of such tariff, submit to the Commission a complete description of the service, along with a statement of its reasons for concluding that the proposed service is a hybrid communications service. Whereupon:

(1) If, at the end of 60 days after such notice is filed with the Commission, the Commission has not advised the carrier of contrary findings respecting its proposed hybrid communication service, the carrier may proceed to file appropriate tariffs in accordance with applicable provisions of the Commission's rules; or

(2) If the carrier is advised within 60 days after the Commission's receipt of notice that the Commission has tentatively concluded that the proposed offering is not a hybrid communication service, the carrier may seek reconsideration of the tentative conclusion, request a hearing on any disputed factual findings or pursue such other remedies as are provided by law.

(f) Before a common carrier may provide its data processing affiliate with communication services and facilities which the latter desires to use for the furnishing of any hybrid data processing service, the carrier shall first submit, directly or through its affiliate a complete description of the proposed service offering, along with a statement of the reasons for concluding that the service is a hybrid data processing service. The carrier may provide such service unless, within 30 days from the receipt of such notice, the Commission shall have advised the carrier or its affiliate of the Commission's tentative conclusion that the intended service is a communications service. If the carrier and its affiliate disagree therewith, the carrier may seek reconsideration of the tentative conclusion,

request a hearing on any disputed factual findings or pursue such other remedies as are provided by law.

(g) No common carrier providing a communication service, hybrid or otherwise may discontinue such tariffed service until authorization to do so is obtained from the Commission. In seeking authorization to discontinue a service, a carrier must:

(1) Demonstrate that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance. Such demonstration shall include whether and to what extent there is a demand for the communication service, the entity or entities which would continue to provide such service if discontinued by the carrier, and the comments of existing customers on any proposed modification of the service and its offering by a carrier's data processing affiliate;

(2) Demonstrate the nature and extent of the public demand for any modified service proposed to be rendered as a hybrid data processing service; and

(3) Submit full information as to the disposition of any of the facilities used in the communication service, including relevant financial arrangements, the accounting to be performed by the carrier with respect to the transaction, and the treatment of any losses sustained in the provision of the communication service.

F.C.C. 73R-134

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of CONGAREE BROADCASTERS, INC., WEST COLUMBIA, S.C. STATESVILLE BROADCASTING CO., INC., COLUMBIA, S.C. For Construction Permits	Docket No. 19624 File No. BPH-7712 Docket No. 19626 File No. BPH-7777

MEMORANDUM OPINION AND ORDER

(Adopted March 27, 1973; Released March 29, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Congaree Broadcasters, Inc. (Congaree), and Statesville Broadcasting Company, Inc. (Statesville), for new FM broadcast stations to operate on Channel 261A at West Columbia and Columbia, South Carolina, respectively. The Commission, by Order, FCC 72-966, 37 FR 24058, published November 11, 1972, designated these applications for consolidated hearing on various issues, including Section 307(b) and contingent comparative issues.[1] Now before the Review Board is a petition to enlarge issues, filed November 27, 1972, by Statesville, which requests the addition of the following issues:[2]

A. To determine whether, under Section 73.202 of the Commission's Rules Channel 261A can be assigned to an FM station to be located at West Columbia, South Carolina.

B. To determine (in the event Issue A is not added) whether the proposal of Congaree Broadcasters, Inc., would realistically provide a local transmission facility for its specified station location or for some other community.

C. To determine with respect to the application of Congaree Broadcasters, Inc.

(1) Whether it has provided sufficient funds for the construction and first year's operation of its proposed station.

(2) Whether the stockholders of the corporation will be able to meet their commitments to the corporation and whether the bank loan committed to the corporation is still available.

(3) Whether, in light of the evidence adduced under the preceding issues the applicant is financially qualified.

[1] A third application, that of West Columbia Broadcasters, Inc., was also designated for hearing, but was dismissed by Order of the Administrative Law Judge, FCC 73M-242, released February 22, 1973.

[2] Also before the Board are the following related pleadings: (a) "Submission of Affidavit", filed December 4, 1972, by Statesville; (b) Broadcast Bureau's opposition, filed December 15, 1972; (c) opposition, filed December 18, 1972, by Congaree; (d) opposition, filed December 18, 1972, by West Columbia; and (e) reply, filed January 8, 1973, by Statesville. Insofar as the petition requests issues against West Columbia Broadcasters, Inc., it is moot and will be dismissed. See note 1, *supra*.

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(4) The details of its proposal for the integration of ownership into the management of its proposed station and whether those details were correctly represented to the Commission.

(5) The effect, if any, on the applicant's legal and character qualifications of any misrepresentation revealed in the evidence adduced under the preceding issue.

Utilization of Channel 261A

2. In questioning whether Congaree can utilize Channel 261A in West Columbia, rather than in Columbia, Statesville contends that when the Commission assigned Channel 244A to Cayce, South Carolina, and Channel 261A to Columbia in the same proceeding [3] it was well aware of the fact that Cayce and West Columbia are adjacent communities in Lexington County, separated from Columbia in Richland County by the Congaree River. Under these circumstances, Statesville submits, "it is clear that the Commission did *not* intend that Section 73.203(b) could be invoked to move Channel 261A across the river to Lexington County." [4] Since it was intended that "each channel should stay where it was put", Statesville argues, Congaree's application should never have been accepted, and therefore an issue is required. The Broadcast Bureau does not believe that the Commission's intent may be so inferred and opposes the addition of an issue. The provisions of Section 73.203(b) are clearly applicable, the Bureau argues, there being no expressed Commission intent to the contrary. The Bureau also notes that the assignment of Channel 261A was made to the "Columbia SMSA", wherein West Columbia is located, and not solely to the city of Columbia.

3. In its opposition, Congaree first characterizes Statesville's request as a petition for reconsideration of the Commission's designation Order over which the Review Board has no jurisdiction. On substantive grounds, Congaree argues that the claims of the petitioner are belied by the fact that the Commission gave the matter full consideration by designating the applications for hearing, *inter alia*, on 307(b) and contingent comparative issues. In reply, Statesville avers that while the arguments in opposition would apply to normal FM channel assignments, they do not pertain to the instant proceeding, which is "quite unusual." Since the Commission intended both sides of the Congaree River to be served, and since the applications here were processed in a "normal manner", then, Statesville argues, no attention to the "unique factors" in this case was given by the Commission or its staff.

4. The Board finds the addition of the requested issue to be unwarranted. First, there is no language in either the designation Order or

[3] Report and Order in Docket No. 19144, 30 FCC 2d 180, 22 RR 2d 1661 (1971). Cayce is located west of Columbia on the other side of the Congaree River. Cayce is in the Columbia Standard Metropolitan Statistical Area.

[4] Section 73.203(b) of the Rules in relevant part provides:

(b) A channel assigned to a community listed in the Table of Assignments is available upon application in any unlisted community which is located within 10 miles of the listed community if the channel requested is a Class A channel . . ., provided no other channel in the listed community has been similarly assigned to another community and provided further that the unlisted community has not already removed a channel from any other listed community. . . .

the Report and Order allocating Channel 261A which would lend support to the petitioner's inferential arguments.[5] Second, petitioner's reliance on language in the Second Report and Order in Docket No. 18125, 17 FCC 2d 952, 957, 16 RR 2d 1547, 1552 (1969), (where the Commission assigned Channel 228A to Columbia and noted that the channel would be available in Cayce under Section 73.203(b)) is misplaced. There is no similar language in the Report and Order in Docket No. 19144, note 3, *supra*, and the absence of such language does not, as Statesville argues, indicate that the Commission intended the "ten-mile" rule to be inapplicable insofar as Channel 261A is concerned.[6] Congaree has applied for a permit in an unlisted community which has not previously removed a channel from a listed community, and which is within 10 miles from Columbia, a listed community not having lost any channel assignment to any other unlisted community. In view of the foregoing, it is manifestly clear that Section 73.203(b) does pertain to this proceeding, and the arguments to the contrary are completely without merit.

Suburban Community Issue

5. In its alternate request for a Suburban Community Issue, Statesville asserts that because Congaree would place a city grade signal (3.16 mv/m) over Columbia, and because only one of its principals has any connection with the principal community of West Columbia, Congaree chose the smaller, neighboring community with the intention of serving Columbia in order to obtain a 307(b) preference, a practice proscribed by the philosophy underlying the 307(b) Policy Statement.[7] Statesville also argues that Congaree's original survey of the general public included only two West Columbia residents and that in response to a Commission letter of inquiry prior to designation, Congaree submitted "additional surveys and a conclusionary apologia that resolved nothing". The Broadcast Bureau opposes the addition of the issue, arguing that Section 73.203(b) contemplates strong signal placement over a listed community by an applicant for an unlisted community;[8] because the residence of stockholders is immaterial to the issue of service to a specified community;[9] and even assuming *argu-*

[5] The Board disagrees with Congaree's contention that Statesville's petition is one for reconsideration. See Section 1.106(a)(1) of the Commission's Rules. Since the designation Order is silent with respect to the matter raised in the petition, we must rule on the merits. *Atlantic Broadcasting Co. (WUST)*, 5 FCC 2d 717, 721, 8 RR 2d 991, 996 (1966).

[6] It is readily apparent from a reading of the Second Report and Order in Docket No. 18125 that the express reference to Section 73.203(b) was addressed to unsuccessful proponents of channel assignments to communities nearby to Columbia. No such factor was involved in the Report and Order in Docket No. 19144, *supra*.

[7] *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965), reconsideration denied, 2 FCC 2d 866, 6 RR 2d 1908 (1966). The philosophy underlying the *Policy Statement* was applied by the Commission to applications for FM facilities in *Berwick Broadcasting Corp.*, 20 FCC 2d 393, 17 RR 2d 884 (1969).

[8] Citing *Amendment of Section 73.203(b) Concerning the Availability of FM Channels to Unlisted Communities*, 12 FCC 2d 660, 662, 12 RR 2d 1612, 1615 (1968). The Bureau also cites *Christian Broadcasting Association, Inc.*, 18 FCC 2d 15, 18, 16 RR 2d 401, 404–5 (1969); and *Harrison Radio, Inc.*, 22 FCC 2d 283, 287, 18 RR 2d 889, 895 (1970) to support its contention that the Review Board has consistently refused to add Suburban Community issues under these circumstances.

[9] Citing *Christian Broadcasting Association, Inc., supra*, note 8; *Almardon Incorporated of Florida*, 16 FCC 2d 395, 399–400, 15 RR 2d 600, 605–606 (1969).

endo, the accuracy of petitioner's claims with respect to Congaree's survey, only a *Suburban* issue might be warranted but not a Suburban Community issue.[10] Congaree, in opposition, argues that Statesville's request for a Suburban Community issue, like its first request, is a petition for reconsideration, but in any event, the allegations are not sufficient to add an issue. Besides, Congaree avers, Section 307(b) will not be determinative because the applicants will cover substantially the same area. In reply, Statesville characterizes this 307(b) argument as an admission that West Columbia has no separate and distinct unsatisfied programming needs; therefore, addition of the issue is necessary.

6. The Board is of the opinion that petitioner's allegations are wholly inadequate to warrant addition of a Suburban Community issue.[11] Geographical proximity, population disparity and the placement of a strong signal over a listed community by an applicant for an unlisted community, while relevant, do not, in the absence of additional allegations, raise a substantial question as to whether an applicant for an FM station would realistically provide a local transmission service for its specified station location. See *Christian Broadcasting Association, Inc., supra. Cf. Edward G. Atsinger, III*, 30 FCC 2d 493, 496–97, 22 RR 2d 236, 241 (1971). Nor is the residence of principals of substantial significance to our consideration here. See *Christian Broadcasting Association, Inc., supra; Almardon Incorporated of Florida, supra.* Moreover, petitioner has failed to establish any governmental, social, civic and economic dependence of West Columbia on Columbia. *Southland, Inc.*, 37 FCC 2d 125, 135, 25 RR 2d 186, 200 (1972), and cases cited therein. Finally, Statesville's allegation, that Congaree's community survey efforts and programming proposals reveal an intention to neglect service to West Columbia, is insufficient to warrant the issue. See *Resort Broadcasting Co., Inc., supra*, 26 FCC 2d at 647, 20 RR 2d at 774. In brief, the Board is of the view that petitioner has not alleged sufficient facts to raise a substantial question, and its request must therefore be denied.

Financial Qualifications

7. Next, Statesville requests the addition of financial issues against Congaree, based on allegations of inaccurate cost estimates, and failure to provide for salaries of principals, payroll taxes and various other expenses, which would allegedly consume the $32,000 "cushion" proposed by Congaree in its application. Petitioner also questions the availability of loans to Congaree because bank letters of commitment are over one year old. Both Congaree and the Broadcast Bureau oppose the addition of the issues, the former relying, in part, on an amendment to its application providing for new and updated loans.[12] The Board

[10] Citing *Almardon Incorporated of Florida, supra*, note 9; and *Resort Broadcasting Co., Inc.*, 26 FCC 2d 642, 646–47, 20 RR 2d 768, 773–74 (1970).

[11] Again, we disagree with Congaree's argument that the instant request is a petition for reconsideration, because there is no "reasoned analysis" of this issue in the designation Order. *Atlantic Broadcasting Co., (WUST) supra.*

[12] The petition for leave to amend was granted and the amendment accepted by Order of the Presiding Judge, FCC 73M–29, released January 10, 1972.

will deny the request to add the issues for two reasons: first, the petitioner has failed to support its allegations with affidavits of persons with personal knowledge, as required by Section 1.229(c) of the Rules;[13] second, Congaree, by amending its application, has adequately answered the questions raised by the Petitioner. See *Pleasant Broadcasting Co.*, 22 FCC 2d 191, 18 RR 2d 689 (1970).

Misrepresentation and Character Issues

8. Finally, Statesville requests that the issues be enlarged to include inquiry into the character qualifications of Congaree's principals because of alleged misrepresentations made with respect to the comparative criterion of integration of ownership and management. Not only are the allegations speculative and conjectural, and therefore procedurally infirm, but the *bona fides* of the applicant's integration proposal may be explored under the existing contingent comparative issue. Petitioner's request will therefore be denied.

9. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed November 27, 1972, by Statesville Broadcasting Company, Inc. IS DISMISSED as moot insofar as it requests issues against West Columbia Broadcasters, Inc., and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[13] See, *e.g.*, *United Television Company, Inc.*, (*WFAN–TV*) 26 FCC 2d 1006, 1009, 20 RR 2d 741, 745 (1970).

F.C.C. 73R-139

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of DUNCAN BROADCASTING CO., INC., DUNCAN, OKLA. WILLIAM S. HAGARA, DUNCAN, OKLA. For Construction Permits	Docket No. 19651 File No. BPH-7747 Docket No. 19652 File No. BPH-7820

MEMORANDUM OPINION AND ORDER

(Adopted March 30, 1973; Released April 3, 1973)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER DISSENTING AS TO ADDITION OF ISSUE (B)

1. The above-captioned mutually exclusive applications for a new FM broadcast station at Duncan, Oklahoma, were designated for hearing by Commission Order, FCC 72-1082, released December 5, 1972, 37 FR 237, published December 8, 1972, under an adequacy of staff issue as to William S. Hagara (Hagara) and a standard comparative issue. Duncan Broadcasting Co., Inc. (Duncan) has now petitioned to enlarge to add the issues inquiring into Hagara's financial qualifications and comparative coverage.[1]

2. In support of the requested financial issues, Duncan notes that Hagara relies upon two commitments to lend money to him. The first is a letter from the First Bank and Trust Company of Duncan, Oklahoma, offering to lend $10,000 to be secured by furniture and fixtures and accounts receivable, and the second is a letter from James L. Labrie offering to lend Hagara $5,000 without security and with all payments deferred until after the first year of operation. As to the bank loan, Duncan contends that, since Hagara has neither furniture and fixtures, nor accounts receivable, the loan cannot be relied on. Petitioner notes that Labrie furnished no balance sheet or other indicia of his ability to lend the money and contends that, since form 301 instructions require such supporting information concerning persons, other than banks or other financial institutions who propose to lend money to broadcasters, this loan cannot be considered to be available to Hagara. Thus, Duncan concludes, since Hagara must have this money to construct and operate his station, an issue must be included. Both the Bureau and Hagara oppose the addition of an issue concerning the availability of the bank loan. They contend that the bank is fully aware that until the station is constructed and in

[1] Duncan's petition was filed on December 22, 1972. The Board also has before it: comments, filed January 9, 1973 by the Broadcast Bureau; an opposition, filed January 29, 1973 by Hagara; and Duncan's reply, filed February 5, 1973.

operation, there will be neither furniture and fixtures nor accounts receivable, but that the bank has indicated its willingness to advance the money and accept an interest in the assets which the station will acquire in the future as security for its loan. The Bureau, however, agrees that, in the absence of the necessary supporting documents, the loan from Labrie may not be relied upon. The Review Board agrees that Hagara has provided reasonable assurance that the bank loan will be available to it; however, since Hagara has provided no evidence of Labrie's ability to make the $5,000 loan, an issue inquiring into the availability of this loan will be included in the proceeding.

3. Duncan also requests an issue to determine the basis of Hagara's estimated costs of construction and first year's operating costs. Petitioner contends that the $7,600.00 Hagara has budgeted for the first year is unbelievable, since it amounts to a total operating cost of only $1.16 per hour. Duncan further alleges that in the operation of its AM station in Duncan, Oklahoma, it has 22 different items of expense, many of which are unavoidable and amount to more than Hagara's entire operating budget. Duncan also observes that Hagara has proposed to lease his equipment and that, after payment for the cost of this equipment there will be only $.44 per hour left to meet all other operating expenses. Furthermore, petitioner points out that Hagara made no allowance for the cost of this hearing in his proposal. In his opposition, Hagara contends that he will devote his full time to the station as general manager and Chief Engineer without salary and that most of his other employees will work either for commission on sales or as independent contractors, and they will be compensated solely by income from sales in the time block they program. To support this contention, Hagara submits affidavits of three prospective independent contractors, each of whom specifies the hours during which he will be available to work at the station and indicates the time period during which he can work without any income from the station. Hagara also submits an affivadit of his wife, to the effect that the income from her business is sufficient to support the Hagara family, and an affidavit of Dick Gilbert, president and treasurer of Arizona Communications Corporation, licensee of Station KXTC, Glendale, Arizona, to the effect that he has operated numerous stations, that at all of them air personalities were independent contractors, compensated by sale of time on their program, and that salesmen worked strictly on commission. Hagara also notes that he has simultaneously filed an amendment to increase his estimated first year's operating costs to $20,000,[2] and providing $4,000 to accommodate the cost of hearing and other unspecified miscellaneous expenses. Thus, the total estimated funds required have been increased from $14,997.00 to $30,000.00. In view of Hagara's explanation and supporting affidavits, an issue concerning the validity of Hagara's construction and first year operating costs is not required. The application as amended makes provision for hearing costs, provides a surplus of funds of several thousand dollars for miscellaneous operating costs and petitioner has

[2] Hagara's amendment, filed January 29, 1973 was granted by Order, FCC 73M–314, released March 8, 1973, and his amendment amplifying the January 29 amendment, filed February 9, 1973 was granted by Order, FCC 73M–265, released February 23, 1973.

supplied no affidavits of persons with personal knowledge alleging that the amended figures are inadequate. In these circumstances, the requested issue will be denied.

4. Duncan also questions the validity of letters filed by Hagara in support of his reliance on estimated revenues during the first year of operation in the amount of $9,440. As amended, Hagara's application reflects that his estimated construction and first year's operating costs will be $30,000.00. To meet this cash requirement, Hagara proposes to rely upon $10,000 in cash on hand, loans netting $12,567, and advertising revenue of $9,440 for a total of $32,000.00. Thus, even assuming that both loans are available to Hagara, without the anticipated revenue he would fall $7,433.00 short of the sum required. If we give Hagara credit for the $15,500.00 shown as cash on deposit in response to question 3(a) in his February 9 amendment, he would still need at least an additional $1,943.00. The commitment letters merely express an intent to advertise in a certain amount on Hagara's proposed new FM station and, in the absence of an evidentiary hearing, we cannot conclude with reasonable assurance that those commitments will actually produce the necessary revenue. See *Erwin O'Conner Broadcasting Co.*, 37 FCC 2d 983, 25 RR 2d 782 (1972). See also *Radio Geneva, Inc.*, FCC 73–295, released March 21, 1973 —— FCC 2d ——, —— RR 2d ——. Accordingly, an issue to determine whether the expected revenue will in fact be available to Hagara will be added to the proceeding.

5. Duncan has also requested addition of an issue concerning comparative coverage of the two proposals. The Review Board has held that questions concerning comparative coverage are encompassed within the standard comparative issue, and, as such, the appropriate procedure is to initially make a threshold showing of substantial difference to the Presiding Judge. *Jaco Inc.*, 18 FCC 2d 677, 16 RR 2d 894 (1969). We will therefore deny the request for a comparative coverage issue.

6. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed December 22, 1972, by Duncan Broadcasting Co., Inc. IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

7. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED as follows:

(a) To determine whether an unsecured loan from James L. Labrie will be available to William S. Hagara to finance the construction and first year's operating expenses of his proposed new FM broadcast station at Duncan, Oklahoma.

(b) To determine whether William S. Hagara may reasonably expect revenues from advertising in the amount of $9,440 during the first year's operation of his proposed new FM broadcast station at Duncan, Oklahoma, and, if not, whether he has available other sources of funds to meet his requirement.

(c) To determine in light of the foregoing whether William S. Hagara is financially qualified.

8. IT IS FURTHER ORDERED, That the burdens of proceeding with the introduction of evidence and proof on these issues SHALL BE on William S. Hagara.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-334

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint of
Ms. RANDY ENGEL
against
WBZ-TV, BOSTON, MASS.

ORDER

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. The Commission has before it an Application for Review filed on February 14, 1973 by Ms. Randy Engel of the Broadcast Bureau ruling of January 17, 1973.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-339

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re the complaint of
MR. DAVID B. FERRIS
against
RADIO STATION WACO, WACO, TEX.

ORDER

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER REID ABSENT.

1. The Commission has before it an Application for Review filed on January 8, 1973 by Mr. David B. Ferris of the ruling of the Broadcast Bureau of December 14, 1972.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review is DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73-352

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (UNION SPRINGS AND TALLASSEE, ALA.)	Docket No. 19628 RM-1902 RM-2040

SECOND REPORT AND ORDER

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. In a First Report and Order released on March 7, 1973 (FCC 73-239), the Commission disposed of RM-1902 (Union Springs, Alabama) in the above-captioned proceeding. The present document deals with the remaining matter. The determination made herein includes consideration of all comments, data, and reply comments submitted in response to the Notice. All population figures referred to herein are from the 1970 U.S. Census.

2. Our proposal in the Notice of Proposed Rule Making (FCC 72-995, 37 Fed Reg. 24369) was based on a petition for rule making filed by The Ne-Ler Company (Ne-Ler), requesting the assignment of Channel 240A to Tallassee, Alabama.

3. Tallassee has a population of 4,809 and is located partly in two counties, Tallapoosa and Elmore (combined population 33,535). It has a daytime AM station licensed to the petitioner. It is noted by the petitioner that in addition to providing a first local nighttime facility to Tallassee, the proposed FM assignment would provide a second aural service at night to both Tallapoosa and Elmore Counties.

4. All Channel TV Service, Inc. (All Channel TV), in timely-filed comments and counterproposal, states that Tuskegee (11,028 population) is the seat of Macon County (24,841 population). It notes that Macon County does not have any standard broadcast station other than a daytime-only station located in Tuskegee, and, accordingly, assignment of Channel 240A to Tuskegee would provide Macon County with its only aural nighttime outlet and with its first FM station. All Channel TV contends that Tallassee has a 1970 U.S. Census population of 4,809, whereas Tuskegee's 1970 Census population is 11,028 or more than double that of Tallassee; and while both Tallassee and Tuskegee receive primary service from only one FM station, the service to Tallassee comes from the nearby, in-state Station WCOV-FM, Montgomery Alabama, and the service to Tuskegee comes from out-of-state Station WRBL-FM, Columbus, Georgia. All Channel TV further contends that Station WABT (daytime-only) is the only aural

outlet of not only Tuskegee, but of Macon County, as well, while on the other hand Tallassee is partly located in two counties, Tallapoosa and Elmore, which have other stations in addition to Station WTLS (daytime-only) at Tallassee, namely: Station WEPU (daytime-only) Wetumpka; Station WRFS (daytime-only), and WRFS–FM, Alexander City.

5. Ne-Ler, in reply comments to All Channel TV's counterproposal,[1] contends that the proposed assignment of Channel 240A to Tallassee would provide an FM service to an area which receives fewer services than the area that would be served by an FM station at Tuskegee. However, the Ne-Ler technical showing is made on the basis of presently existing facilities. If the showing were made in accordance with *Roanoke Rapids-Goldsboro, N.C.*, criteria (9 F.C.C. 2d 672 (1967)), the number of services that would be available would be the opposite.

6. Using the latter criteria, the situation would be as follows: Tallassee and the area surrounding it would lie within the 1 mv/m contours of five stations (Channels 222, 255, 270, 277 at Montgomery, Alabama; Channel 291 at Alexander City, Alabama). On the other hand, Tuskegee and the area surrounding it would lie within the 1 mv/m contour of only one station (Channel 275 at Columbus, Georgia), although portions of Tuskegee would lie within the 1 mv/m contours of the four stations located at Montgomery. Moreover, since Tallassee is closer to Montgomery and to Alexander City than Tuskegee is to Montgomery and to Columbus, a larger number of other services would be available within most of the 1 mv/m contour of a Tallassee station than would be available within most of the 1 mv/m contour of a Tuskegee station. This is so even though the 1 mv/m contour of a Tuskegee station would overlap the 1 mv/m contours of three stations (Channels 249A, 261A, and 289, at Auburn, Phenix City, and Troy, Alabama, respectively) in addition to overlapping the five Montgomery and Columbus stations, whereas the 1 mv/m contour of a Tallassee station would overlap the 1 mv/m contour of only one station (Channel 289, Auburn) in addition to overlapping the five Montgomery and Alexander City stations.

7. Neither a station at Tallassee nor one at Tuskegee would provide a first service to any area within its 1 mv/m contour. Each would provide a second service, however, and the areas so served would be nearly equal in size.

8. After careful consideration of the proposal, counterproposal, comments and reply comments we conclude that since Tuskegee is a county seat and has a larger population—11,028 as compared to 4,809 for Tallassee—and would provide for a third service to a larger area, assignment of Channel 240A to Tuskegee would serve the public interest and should be granted.

9. Authority for the amendment adopted herein is found in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

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[1] On February 23, 1973, All Channel TV filed a motion to strike reply comments of Ne-Ler on the grounds that the basic assumptions relied upon by the Ne-Ler consulting engineer are at variance with the criteria for evaluating "white area" situations. Since the reply comments of Ne-Ler were filed in accordance with the cutoff procedure, the motion will be denied.

10. Accordingly, IT IS ORDERED, That effective May 9, 1973, the Table of Assignments contained in Section 73.202(b) of the Commission's Rules and Regulations IS AMENDED, insofar as the community named below is concerned to read as follows:

City:	Channel No.
Tuskegee, Ala	240A

11. IT IS FURTHER ORDERED, That the motion to strike reply comments of The Ne-Ler Company, filed February 23, 1973, by All Channel TV Service, Inc., IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

40 F.C.C. 2d

F.C.C. 73-353

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS. (WASHINGTON, IA.; CENTERVILLE, TENN.; WINNSBORO, TEX.; STANTON, KY.; GORDON, GA.; MERCERSBURG, PA.; ELKADER, IA.; AND KERNVILLE, CALIF.	Docket No. 19598 RM-1926, RM-1969, RM-1972, RM-1988, RM-1993, RM-1996, RM-2009, RM-2010

SECOND REPORT AND ORDER

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. In a first Report and Order in this porceeding released December 18, 1972 (FCC 72-1134, 38 F.C.C. 2d 532) the Commission disposed of all the matters before it except RM-2010, which pertains to the proposed assignment of a Class A channel to Kernville, California, as discussed below. Comments were first invited on the proposal in our Notice of Proposed Rule Making released in this proceeding on October 2, 1972 (37 Fed. Reg. 21353). The determination made herein is based upon a study of all the comments and data submitted in response to the Notice.

2. *RM-2010, Kernville, California.* On July 7, 1972, Kern River Valley Radio, Inc. (Kern River), a corporation of the State of California, filed a petition for rule making requesting the assignment of Channel 272A to Kernville, California. Kernville is an unincorporated community in the Lake Isabella region (9,240 population)[1] of Kern County (329,162 population). It is located in Central California, immediately north of Los Angeles County. In the Notice of Proposed Rule Making we set out information pertaining to the need for a first FM assignment to Kernville, California, and will not repeat it here. Kernville and the Lake Isabella region presently have no local broadcast transmission service of any type. Petitioner states that the assignment of the proposed channel will provide a means of dissemination of local news and items of interest, furnishing a medium for local expression and talent, and would serve as an initial means of advertising for local merchants and businessmen.

3. Comments were filed by Kern River Valley Radio, Inc. (petitioner) and John M. Ridenour (Ridenour). Kern River supports the proposed assignment of Channel 272A to Kernville. Ridenour states that he has no objection to the assignment of Channel 272A to Kernville provided that such an assignment does not serve to militate

[1] Population figures are from the 1970 U.S. Census reports.

against consideration of his application for a first AM facility in the area.

4. The assignment of Channel 272A to Kernville would not foreclose consideration of an AM station there. Kernville is an isolated community, 38 miles from Bakersfield and 41 miles from Porterville where aural broadcast stations are located, and does not receive aural broadcast services as defined by Section 73.37(e) of the Rules.[2] Thus it would qualify for at least two aural broadcast stations as provided by that Rule. The assignment of Channel 272A would provide for a first FM station which would also be a first aural broadcast service to Kernville.

5. In view of the foregoing, the public interest, convenience and necessity would be served by the assignment of Channel 272A to Kernville, California. Accordingly, IT IS ORDERED, That effective May 9, 1973, the Table of FM Assignments, Section 73.202(b) of the Rules, IS AMENDED, to read as follows:

	Channel No.
City: Kernville, Calif	272A

Authority for the action taken herein is contained in Sections 4(i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] This provision, adopted in our Report and Order in Docket No. 18651, FCC 73–220, February 21, 1973, becomes effective April 11, 1973.

F.C.C. 73-319

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re GENERAL ELECTRIC CABLEVISION CORP., PEORIA, ILL. For Certificate of Compliance	CAC-9 IL109

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 27, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS H. REX LEE, REID, AND WILEY CONCURRING IN THE RESULT.

1. On March 7, 1972, General Electric Cablevision Corporation filed an application (CAC-9) for certificate of compliance for a new cable television system to operate at Peoria, Illinois (the 83rd television market). General Electric proposes to carry the following Illinois television signals: WRAU-TV (ABC), WMBD-TV (CBS), WEEK-TV (NBC), and WTVP (Educ.), all Peoria; WGN-TV (Ind.), WSNS-TV (Ind.), both Chicago; and WILL-TV (Educ.), Urbana.[1] General Electric's application is opposed by: the City of Peoria, Illinois; Midwest Television, Inc., licensee of Station WMBD-TV, Peoria, Illinois; and Mid-America Television Company, licensee of Station WEEK-TV, Peoria, Illinois.

2. The City of Peoria urges that a certificate should not be issued until litigation between it and General Electric has been resolved. The City argues that the validity of General Electric's franchise is in doubt; that on April 6, 1966, it awarded General Electric a franchise, which it terminated February 24, 1971; that General Electric filed suit for declaratory judgment against it, and on January 28, 1972, the Circuit Court of Peoria County entered a decree invalidating the default and forfeiture against General Electric Cablevision by the City of Peoria; and that the City has appealed the Circuit Court's decree. On December 15, 1972, the Appellate Court of Illinois for the Third District affirmed the judgment of the Circuit Court of Peoria County, and the City of Peoria has not appealed. The City of Peoria's objection is thus moot.

3. Midwest and Mid-America both objected to proposed carriage of Station WCIU-TV, Chicago, Illinois, but this argument is now moot (see footnote 1). Midwest and Mid-America both question the validity of General Electric's franchise, a question we dealt with above, and

[1] General Electric initially proposed to carry Station WCIU-TV (Ind.), Chicago, Illinois; however, on October 31, 1972, it withdrew this proposal.

both argue that General Electric's franchise does not comply with section 76.31 of the Commission's Rules. Specifically, Midwest claims: that there is no timetable provision for percentage of energized trunk cable to be extended each year; that the franchise period is for 20 rather than 15 years; that there is no provision for procedures for the investigation and resolution of service complaints; that there is no provision requiring the maintenance of a local business office; that there is no provision for the incorporation within the franchise of modifications of Commission rules; that the franchise fee is 5% to 10%, or a minimum payment of $12,000 per year. Mid-America only argues that the franchise fee is too high.

4. We rule on these arguments as follows: the franchise requires General Electric to provide service in accordance with an extension policy approved by the City Council; since the franchise was granted April 6, 1966, the fact that it is for a 20 year duration is academic; General Electric promises that it will adequately service all complaints, and maintain a local business office; the franchise requires General Electric to comply with all the Commission's rules and requirements; while the franchise fee goes beyond our standards, since the system is not yet operating, and since conformity with our standards is required by March 31, 1977, it does not appear that a significant deviation from our standards will occur in the interim.[2] Consequently, we find substantial compliance sufficient to justify grant of the application until March 31, 1977. E.g., *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10.

5. Midwest argues that General Electric's statement concerning its plan to utilize its access channels is inadequate. General Electric supplemented its statement as follows:

> Applicant, with 30 channels available, has sufficient capacity to implement a comprehensive access program as follows:
>
> (a) For each Class I cable channel utilized, the system will have an additional channel available, 6 MHz in width, for the transmission of Class II and Class III signals;
>
> (b) The system will maintain a "technical plant" with 2-way capacity;
>
> (c) One specifically designated "Public Access" channel will be maintained, with equipment and facilities available for its use;
>
> (d) One specifically designated educational access channel will be utilized;
>
> (e) One specifically designated channel for local government use will be available;
>
> (f) Channels will be available on a leased basis, subject to the Commission's rules concerning use and displacement;
>
> (g) When access channels are used to the degree contemplated by the rules, capacity for non-broadcast access will be expanded;

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[2] Section 14 of the Franchise provides for the following fee:

When gross revenue in any one month is:	*Percent of total gross revenue paid to the city*
Less than $95,000	5
$ 95,000 to 109,999	5½
$110,000 to $124,999	6
$125,000 to $139,999	6½
$140,000 to $154,999	7
$155,000 to $169,999	7½
$170,000 to $184,999	8
$185,000 to $199,999	8½
$200,000 to $214,999	9
$215,000 to $229,999	9½
$230,000 and over	10

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(h) No program content control will be exercised over these channels, but operating rules for their use will be established;

(i) The educational and local government channels will be made available, without cost, for five years following completion of the basic trunk line of the system and commencement of service;[3]

(j) A full-time "Director of Local Programming" will be employed to develop the use of these channels in Peoria.

We find this an adequate statement. *Viking Media Corporation* FCC 72–875, 37 FCC 2d 605.

6. Finally, Midwest objected to General Electric's failure to give assurance of compliance with the exclusivity requirements of the Commission's rules. But General Electric now assures us that it will comply with the Commission's exclusivity rules.

In view of the foregoing, the Commission finds that grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection to Application of General Electric Cablevision Corporation for Certificate of Compliance" filed November 1, 1972, by the City of Peoria, Illinois, IS DISMISSED as moot.

IT IS FURTHER ORDERED, That the "Objection Pursuant to Section 76.17" filed May 12, 1972, by Midwest Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application of General Electric Cablevision Corporation For Certificate of Complance" filed May 12, 1972, by Mid-America Television Company, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC–9) for certificate of compliance IS GRANTED and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] We understand this to be a restatement of Section 76.251(a)(10) of the Rules and expect the applicant to adhere to the terms of that provision.

F.C.C. 73-340

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

FIRST SUPPLEMENTAL NOTICE

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. By this first supplemental notice of inquiry and rule-making in this Docket, we are requesting comments on certain proposals submitted recently to the Commission recommending the establishment of programs for technical standards and enforcement thereof that, if adopted, would expand the options available to customers in the interconnection of customer-provided facilities to the nationwide telephone network.

2. In initiating this proceeding we stated that there are two basic issues to be explored. The first, or threshold question, is whether the telephone companies subject to our jurisdiction should be required or permitted to make further significant revisions in their interstate MTS and WATS tariffs so as to give customers options that they do not now have thereunder, namely that of being able generally to provide their own network control signalling units (NCSUs) and any needed connecting arrangements (CAs), or the functional equivalent thereof, in lieu of using telephone company-provided NCSUs and CAs as is now required under the tariffs in all interconnection situations involving direct electrical connections. The second basic issue is to determine what terms and conditions should govern if we should decide to extend such options to customers. We stated that, to facilitate resolution of both of these issues, we had, *inter alia*, established certain Advisory Committees to explore the possibilities of establishing a technical standards program for certain selected classes of equipment, i.e. PBXs, dialers and automatic answering devices, that could be a basis for providing such expanded options, at least as to these devices, and at the same time protect the integrity of the telephone network. (See 35 F.C.C. 2d, 539 et seq.; June 16, 1972)

3. We have now received the reports and recommendations of the PBX Standards Advisory Committee. These documents have been printed in two volumes and are available from the National Technical Information Service, Port Royal Road, Springfield, Virginia 22151.

Volume I (PB 212937) contains the Proposals of the Technical Standards Subcommittee (for Barrier-Type PBX) and Procedures and Enforcement Subcommittee (cost—$6.00). Volume II (PB 212938) contains the attachments to the Report of the Subcommittee on Procedures and Enforcement (cost—$3.00). A third volume (PB 213001) contains a Proposed PBX Experimental Program submitted by the PBX Procedures and Enforcement Subcommittee of the PBX Standards Advisory Committee (cost—$3.00). Any of these three volumes may also be ordered in microfiche form for 95¢ each.

4. In addition to the reports and recommendations of the PBX Standards Advisory Committee, which are limited to customer-provided PBX's, the Office of Chief Engineer of the Commission (OCE) has prepared and submitted a broader proposal that would apply to all kinds of customer-provided devices connected directly to the switched telephone network of the telephone companies. This OCE report is available in printed form as Technical Report T–7202 and may be obtained from the National Technical Information Service, Port Royal, Springfield, Virginia 22121 (cost—$3.00; 95¢, microfiche; PB–213018).

5. The principal features of the OCE proposal are described as follows. The Commission would incorporate into its rules the technical characteristics which must be met by all devices intended for direct connection to the switched telephone network. These specifications would be designed to provide reasonable protection against specific types of harm to the network, namely, hazardous voltages; in-band and out-of-band signal power; line inbalance; and improper network control signaling. Any manufacturer desiring to obtain approval for connection of devices to the switched telephone network would make application to the Commission for registration of each such device, providing a complete description of the device and all data required to demonstrate compliance with the standards. The Commission would, where necessary, also require the submission of sample units to its own laboratory for testing, otherwise, the attestation of the person performing the tests would be acceptable. Upon determination that the equipment would be capable of complying with the standards and that a grant would serve the public interest, convenience and necessity, a registration certificate would be granted. This would be attached to all identical units subsequently produced. If any application presented substantial factual questions that needed to be resolved, it could be set for evidentiary hearing. Registration would constitute authorization for the equipment to be directly connected to the switched telephone network. However, in appropriate cases, registration could be revoked. Applicants for registration would be required to pay filing fees which, as set forth in the proposal, would range from $500 to $1,000 and grant fees which are proposed to range from $100 to $500.

6. Further, under the OCE proposal the burden of showing *actual* (not potential) harm to the switched network in individual cases would rest upon the person claiming that harm was being caused.

This would apply to both the carrier and the customer providing his own device. Where a *proved* harm is found to exist the Commission could issue cease and desist orders. The proposal also provides for the tariffs of the telephone companies to be amended to specify that only devices approved by the Commission could be directly connected to the switched telephone network, and that in the event of *actual* harm, the carrier could disconnect the harmful device, whether or not it was approved. The proposal includes recommended federal legislation similar to that now set forth in Section 302 of the Act under which the FCC would be given express authority to regulate the sale, distribution, import, lease, use and manufacture of interconnection devices and under which the Commission would promulgate regulations to control effectively the marketing of non-complying devices. Finally, the proposal provides for state regulation and enforcement at the local level of any necessary installation or inspection requirements.

7. We have also received an alternative proposal by the NARUC Staff Subcommittee on Communication Interconnection. This proposal was submitted to the Commission under date of March 2, 1973 and is entitled "Procedures and Enforcement For Interconnection of Customer-Provided Communication Terminal Equipment." The Staff Subcommittee states that this proposal contains some concepts differing widely from other submissions and that the areas of most significant differences are: "(a) The proposal for an NARUC–FCC Interconnection Staff Committee as advisory to the Joint Board and/or the FCC on matters relating to an interconnection program; (b) The sections on enforcement methodology; (c) The sections on procedures for equipment installation and periodic maintenance inspection; and (d) The designation of the party to perform installation and periodic maintenance inspections." Copies of this report are available from the NARUC Washington, D.C. office. (1102 Interstate Commerce Commission Building, P.O. Box 684, Washintgon, D.C. 20044—Telephone No. 202–628–7325.)

8. In addition to the foregoing, the Commission has received other alternative suggestions that have been submitted informally in varying degrees of completeness as to specific standards that should apply and as to details of implementation. Some of these alternative proposals may be briefly identified as follows: (1) the suggestion that we adapt to interstate MTS and WATS services the intrastate "access arrangement" proposal of the Rochester Telephone Company approved in substantial part by the New York Public Service Commission in Opinion 72–18, Case 26064, 94 PUR 3d 370 (NY P.S.C. 1972); (2) Suggestions that the carrier be required to establish reasonable standards in the tariffs or in technical references and be responsible for enforcing compliance therewith similar in nature to the recent AT&T tariff revisions applicable to customer-provided headsets; and (3) Suggestions that the tariffs remain basically unchanged but that the carriers be required (a) to make improvements in their services,

such as elimination of delays in delivery of NCSUs and CAs, and (b) apply the same practices to carrier-provided facilities that are applied to customer-provided facilities.

9. These briefly described alternative proposals have not been submitted in sufficiently complete form to enable us or the Joint Board to consider them adequately. Accordingly, we invite interested parties who want to propose these or any other alternative programs to do so at the time fixed herein for filing comments. We emphasize that any alternative proposal should be in at least the same detail as the proposals of the PBX Advisory Committee and the Office of the Chief Engineer. Moreover, by the time that comments herein are due to be filed, we expect that the proposals of the Dialers and Answering Device Advisory Committee will be ready for submission to the Commission. Such proposals should be officially submitted as comments herein. Finally, inasmuch as we are providing that additional proposals may be submitted on or before the comment date, we are expressly allowing for reply comments so that we may have the benefit of the views of all interested parties on any additional proposals that may be submitted.

10. In submitting comments on proposals herein, we wish to make clear that we are concerned at this stage of the proceeding with whether it is feasible from a technical, engineering, operational, and administrative standpoint to establish an optional program of standards and enforcement thereof in lieu of or in addition to the present tariff requirements for carrier-provided NCSUs and CAs. Although we do not wish to limit the scope of comments on any of these proposals, we are not considering at this time questions as to whether or to what extent there may be any adverse economic or environmental consequences from the ultimate adoption of any of these proposals. We shall cover such issues in an appropriate manner by further supplemental notices in the near future. We are, however, interested at this time in ascertaining the total estimated costs of implementing and administering each of the proposed programs and in obtaining comments and views on how such costs should be financed and what persons or groups of persons or entities should be required to bear such costs. Accordingly, we invite the submission of the best estimates of the total costs of administering each proposal that is submitted and views as to how such costs should be borne. Further, we invite comments and views as to the specific procedures and rules that should apply to each proposal submitted, including details as to the methodology that should be followed to assure meaningful and effective enforcement of the requirements set forth in the proposal.

11. Accordingly, pursuant to the provisions of Sections 4(i), 4(j), 201–205, 208, 215, 218, 313, 403 and 404 of the Communications Act, the Commission hereby invites comments from interested parties on the aforementioned proposals of the PBX Standards Advisory Committee, NARUC and Office of Chief Engineer. Such comments, which may include any alternative proposals, shall be submitted on or before June 15, 1973.

Reply comments may be filed on or before August 15, 1973. As provided in our order herein of June 16, 1972 (35 F.C.C. 2d 539; 543) proposals, comments and reply comments will be referred to the Joint Board for its consideration and recommended decision. Based upon its review of the comments and the questions presented thereby, the Commission, after consultation with the Joint Board, will prescribe additional procedures as may be necessary and appropriate for the effective and expeditious resolution of this proceeding. An original and 14 copies of all comments and reply comments shall be submitted.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–133

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEXINGTON COUNTY BROADCASTERS, INC., CAYCE, S.C.	Docket No. 19568 File No. BPH–7605
WILLIAM D. HUNT, CAYCE, S.C.	Docket No. 19569
For Construction Permits	File No. BPH–7658

MEMORANDUM OPINION AND ORDER

(Adopted March 27, 1973; Released March 29, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Before the Review Board is a petition to enlarge issues, filed September 5, 1972, by William D. Hunt (Hunt), requesting the addition of *Suburban*, misrepresentation, financial, ineptness and technical issues against Lexington County Broadcasters, Inc. (Lexington County).[1]

SUBURBAN ISSUE

2. In support of this request, Hunt alleges that Lexington County's *Suburban* showing is deficient in several respects. Although Lexington County in its survey exhibits claims that "hundreds" of community leaders were surveyed, Hunt alleges that Lexington County's list of fifty-six community leaders appearing in its original application and the four additional leaders listed in an amendment to its *Suburban* showing hardly substantiates its claim. Petitioner points out that, in response to a Commission inquiry made prior to designation which requested further information to determine whether Lexington County had interviewed an adequate number of black community leaders, Lexington County amended its ascertainment exhibits to show that it had interviewed blacks, and to substantiate this claim Lexington County submitted four additional names to add to its list of community leaders. Hunt argues, however, that Lexington County's list of community leaders does not indicate how many black leaders were interviewed and whether the four additional community leaders were black. Moreover, even if the four persons listed in the amendment were black, petitioner argues that that number falls short of interviewing black community leaders in proportion to the 10% to 12% blacks living

[1] Also before the Review Board are the following related pleadings: (a) opposition, filed October 4, 1972, by Lexington County; (b) Broadcast Bureau's comments, filed October 4, 1972; (c) reply, filed October 16, 1972, by Hunt; (d) supplement to (c), filed October 26, 1972, by Hunt; (e) petition to dismiss (d), filed November 6, 1972, by Lexington County; (f) opposition to (e), filed November 20, 1972, by Hunt; and (g) reply, filed December 4, 1972, by Lexington County.

in the city and county to be served, as shown in Lexington County's own demographic study. Further, Hunt contends, although Lexington County asserts that 75% of the community leaders it surveyed came from Cayce, it failed to provide addresses from which it could be determined which leaders were from Cayce and which were from Columbia. Petitioner also contends that Lexington County's ascertainment showing does not indicate whether principals or management-level employees of the applicant contacted the community leaders, and that no attempt appears to have been made to contact leaders from such major groups within the community as labor organizations, student organizations or cultural groups. Next, Hunt alleges that, although Lexington County claims in its survey exhibit that "1000" interviews with laymen were conducted, no indication is given as to how recently the general public surveys were taken, who conducted them, whether they were properly supervised, or the frequency of specific responses. Finally, Lexington County has not shown, according to petitioner, which of its proposed programs are intended to deal with which of thirteen problems it listed. Both the Broadcast Bureau and Lexington County oppose the request.

3. The Review Board is of the view that petitioner's allegations raise a substantial question as to the adequacy of Lexington County's *Suburban* showing, as amended, and we therefore believe an appropriate issue is warranted. It appears that Lexington County may not have complied with a number of the *Primer's* [2] requirements. First, Lexington County does not appear to have indicated whether principals or management-level personnel conducted its survey of community leaders. See Q. & A. 11(a), *Primer, supra.* Second, it cannot be determined, with regard to many of the community leaders contacted, who actually live in Cayce and who live in Columbia or West Columbia. Absent such information, it cannot be determined whether a cross section of leaders has been contacted. *Primer, supra.* Third, it is not clear from the list of community leaders submitted by Lexington County in its application whether leaders from such groups as labor or student organizations were contacted. See Q. & A. 10, *Primer, supra.* Fourth, from the limited information provided by Lexington County with respect to its survey of the general public, it cannot be determined when the surveys were taken, who conducted them, and whether a random sample was obtained. See Q. & A. 13(b), 14 and 15, *Primer, supra.* Finally, a question exists as to which of the thirteen problems listed by Lexington County are to be treated by which of its proposed programs. See Q. & A. 29, *Primer, supra.* The Board notes, however, that we do not agreed with petitioner that Lexington County's *Suburban* showing is deficient because it included only five black community leaders in an area with a population of "10% to 12%" blacks. The Commission has made it clear that it does not require statistical accuracy by requiring interviews with community leaders of minority groups in proportion to that group's total representation in the community, and petitioner's allegations do not indicate that Lexington

[2] *Primer on Ascertainment of Community Problems by Broadcast Applicants,* 27 FCC 2d 650, 21 RR 2d 1507 (1971).

County has not elicited adequate information from the leaders contacted. See *WGN of Colorado, Inc.*, 35 FCC 2d 789, 24 RR 2d 828 (1972); *cf. WKBN Broadcasting Corp.*, 30 FCC 2d 958, 22 RR 2d 609 (1971); and *Universal Communications Corp.*, 27 FCC 2d 1022, 21 RR 2d 359 (1971).

MISREPRESENTATION ISSUE

4. In support of its request, Hunt asserts that Lexington County, by incorporating by reference its WCAY–AM, Cayce, South Carolina, renewal application (BR–3689) into the legal qualifications section (Section II) of its application (FCC Form 301), made misrepresentations to the Commission. Petitioner notes that the information required to be disclosed in the legal qualifications section of a renewal application form (FCC Form 303) differs from that called for in the application form for a new facility (FCC Form 301), and that the most recent application form filed by Lexington County requiring the same information required in the present form was its application for assignment of license of Station WCAY(AM) (BAL–3672), filed October 15, 1959. Therefore, petitioner alleges, the facts represented in that application must be regarded as being incorporated into the subject application. Comparing the 1959 application with subsequent events involving the applicant, Hunt alleges that the following changes have occurred: the 1959 application shows Lexington County as having four stockholders; however, Lexington County is now owned by a New York corporation called Tice Enterprises, Inc., 100% owned by James Olin Tice, Jr., president of Lexington County; the 1959 application indicates five broadcast interests held by Tice which have subsequently been disposed of, and fails to show three additional broadcast interests acquired after he filed the 1959 application; and two of his subsequently acquired interests ended in involuntary assignment.[3] An issue is warranted, Hunt argues, not only to explore the omissions listed above, but also to explore what other events may have transpired in the thirteen intervening years since the filing of the 1959 application.[4] In opposition, Lexington County claims that its incorporation by reference of WCAY(AM) (BR–3689) was intended to incorporate Section I, Question 7 of the Renewal Application (FCC Form 303) and the Ownership Reports filed in connection with its 1963, 1966, 1969 and 1972 renewals.

5. The Review Board agrees with the petitioner and the Broadcast Bureau that an issue is warranted. The purpose in permitting incorporation by reference is to avoid excessive duplication of information already before the Commission. If previously filed renewal applications and ownership reports contain information requested in the new application, an applicant is not required to duplicate this information

[3] Tice acquired Stations WEET, Richmond, Virginia, and WJBE (formerly WGYW), Knoxville, Tennessee, both of which, according to petitioner, were assigned during the first half of 1967 (BAL–6004, BAL–6042).

[4] Hunt asserts that it cannot be determined whether since 1959: (1) Tice has had a station license revoked by Order of a Federal Court (section 10(a)); (2) Tice has been found guilty of violating federal anti-trust laws (question 10(b)); (3) Tice has been convicted of any felony (question 10(i)); and (4) any unsatisfied judgment or decrees against Tice are outstanding (question 10(g)).

in the new application form, assuming that the information is still accurate and complete. For this reason, the Board has allowed incorporation by reference. See *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 175, 20 RR 2d 528 (1970). However, we have held that when an applicant does incorporate by reference he must give "specific reference" in the application to the documents incorporated. See *Hartford County Broadcasting Corp.*, 9 FCC 2d 698, 10 RR 2d 1083 (1967). Some of what is contained in Lexington County's previous renewal applications on file with the Commission can be utilized in answering some of the questions asked in FCC Form 301; for example, the ownership reports attached to renewal applications as well as responses to Question 7, Section I, FCC Form 303, can be used to answer Questions 11 through 22, Section II, page 2, FCC Form 301, if the information contained therein is complete and accurate. However, as the Bureau points out, although it can be derived from Lexington County's ownership report that Tice was the majority stockholder in WEET and WGYN (now WJBE), this determination cannot be made without a searching effort into its ownership reports which does not comport with the "specific reference" requirement for incorporating by reference.[5] Furthermore, the ownership reports do not disclose when and under what circumstances Lexington County disposed of these interests.[6] Also, we do not believe that a reference to Lexington County's past renewal applications provides satisfactory responses to the legal qualifications section (Section II, FCC Form 301) which is entitled "Citizenship and Other Statutory Requirements" which begins with Question 6 and concludes with Question 10. Moreover, Lexington County concedes that it failed to report a judgment entered against Tice on July 14, 1969, which is required to be reported by Question 10(g), Section II (FCC Form 301). Therefore, we agree with the Broadcast Bureau that addition of a Rule 1.514 issues is appropriate.[7] Finally, we do not believe that a separate misrepresentation issue is warranted. The question of whether Lexington County intended to mislead the Commission by its apparent failure to report certain information can be explored under the issue being added herein.

FINANCIAL ISSUE

6. In support of its request for a financial issue, Hunt alleges that Lexington County has underestimated its costs, and that its ability to repay its loan commitment is questionable. According to Hunt, Lexington County's proposed cost figures of $53,401.85 does not include any expenses for legal fees. Legal costs in this kind of proceeding ordinarily run from $10,000 to $30,000, Hunt asserts. Furthermore, peti-

[5] See *Bangor Broadcasting Corp.*, 33 FCC 2d 677, 23 RR 2d 711 (1972), where the document incorporated did not clearly set forth the information allegedly contained therein.

[6] The August 20, 1966, ownership report for WCAY listed Tice's interests in WEET and WGYW (now WJBE), but the April 8, 1969, ownership report did not list these interests.

[7] The Board does not agree, however, with petitioner's premise that, when an existing licensee applying for a new facility incorporates by reference material contained in previously filed new and renewal applications and ownership reports, the Commission must focus only on the initial application (FCC Form 301) because the legal qualifications section in a renewal form (FCC Form 303) differs from that found in a new form (FCC Form 301).

tioner notes, although Lexington County has obtained a commitment for a $100,000 loan from a lending institution, under the terms of the loan Lexington County will have to make repayments of 14½% interest plus principal over a five-year period commencing the first year. Hunt alleges that the interest repayment will run from $2,000 to $3,000 per month or about $30,000 per year. Petitioner points out that in an amendment, filed May 18, 1972, Lexington County indicated a "cash flow" of $40,000 from its presently operating AM station for 1972, which, it urged, would be available for the proposed FM station. However, Hunt argues, the availability of this fund is suspect because Lexington County showed earned surplus deficits in the balance sheets submitted with its AM station renewal applications for 1963, 1966 and 1969 renewal periods; furthermore, Tice was forced to dispose of stations, WGYW (now WJBE) and Station WEET because of financial difficulties he had in running those stations. With such a precarious financial background, serious questions are raised as to whether Lexington County can meet its proposed costs, Hunt concludes.

7. The Review Board agrees with both Lexington County and the Broadcast Bureau that addition of a financial issue is not warranted. Normally, such an issue would be warranted where a substantial cost item has been omitted by an applicant; however, where it appears that sufficient surplus funds or "cushion" is available to cover the omitted expense, there is no need to add the issue. See *Home Service Broadcasting Corp.*, 21 FCC 2d 168, 18 RR 2d 63 (1970); *Virginia Broadcasters*, 22 FCC 2d 227, 18 RR 2d 763 (1970). Lexington County submitted with an amendment to its application a commitment letter from Blair Walliser, President of Communications Fund, Inc., agreeing to loan Lexington County $100,000. This sum would supply Lexington County with a surplus of $46,000 ($100,000 less the $53,401.85 proposed total for construction and first-year operating costs), which, in our view, is sufficient to meet the omitted estimate of legal costs and the interest payment due on the loan, particularly in light of the fact that petitioner's estimate for legal costs is not adequately supported. Whether or not Lexington County will have the projected cash flow claimed is therefore irrelevant. Furthermore, petitioner has not shown how the alleged involuntary assignment by Tice of Stations WEET and WJBE due to financial difficulties and the earned surplus deficits reported in each of the renewal applications of WCAY for 1963, 1966 and 1969 directly affect Lexington County's present financial position. As stated above, it appears that Lexington County can meet its expenses from its funds available and Hunt has not shown how the factors enumerated above would adversely affect Lexington County's loan commitment. Compare *Voice of Reason, Inc.*, 23 FCC 2d 782, 19 RR 2d 288 (1970).

INEPTNESS AND LACK OF DILIGENCE ISSUE

8. In support of its request, Hunt argues that Lexington County's application is deficient in the following respects: (1) the ascertainment of community needs survey fails to meet the basic requirements of the *Primer*; (2) it is incomplete and incorrect by the attempt to incorporate by reference information on file with the Commission; and (3) the

financial proposal is apparently "blue sky" and unsatisfactory. Furthermore, petitioner urges, Tice's ineptness is demonstrated by his inability to successfully operate two broadcast stations profitably. The Bureau believes an issue would be warranted, unless Lexington County in its responsive pleading makes a convincing showing regarding its failure to make full disclosure of its ownership changes and the bankruptcy proceedings.

9. The Board is of the opinion that petitioner's allegations do not demonstrate a pattern of carelessness, inadvertence, neglect and indifference to the Commission's Rules and Regulations, and therefore that the addition of the requested issue is unwarranted. See *Media, Inc.*, 22 FCC 2d 886, 19 RR 2d 2 (1970); compare *Beamon Advertising, Inc.*, FCC 63R–467, 1 RR 2d 285 (1968). We have already dealt with petitioner's allegations with respect to Lexington County's ascertainment survey, incorporation by reference from its renewal applications and financial proposal, and we do not believe the allegations which warranted our specifying herein a *Suburban* and Rule 1.514 issues suggest any pattern of neglect or carelessness on the part of Lexington County. Furthermore, events which do not directly affect the application in this proceeding, such as previous financial failures in other broadcast ventures, in our view, do not raise questions of ineptness or carelessness by the applicant in this proceeding. See *Aljir Broadcasting Co., Inc.*, 12 FCC 2d 163, 12 RR 2d 986 (1968); *Media, Inc., supra.*

FEASIBILITY ISSUE

10. Finally, petitioner requests addition of the following issue:

To determine whether Lexington County Broadcasters, Inc. can provide the signal coverage which it has proposed based upon its engineering data, and whether the proposal by Lexington County Broadcasters, Inc. to add substantial additional height to the existing antenna tower presently in use by WCAY and side-mount the antenna is feasible.

In support of the requested issue, Hunt first contends that the power gain of the antenna system proposed by Lexington County will be 2.025, not 2.2, as indicated in Lexington County's application. Hunt alleges that Lexington County's proposed addition of 85 feet and a side-mounted FM antenna with related material to the existing WCAY (AM) 300 foot tower would be unsafe because the existing tower cannot support the additional height and side-mounted equipment. To support this allegation, Hunt submitted with his petition a letter from a structural engineer. According to Hunt's interpretation of the engineer's letter, the type of tower used by WCAY "cannot ordinarily accommodate safely an addition of the type proposed by (Lexington County) absent basic structural changes on the antenna".[8]

11. The Board will deny the requested issue. Lexington County's amendment to its application correcting the antenna tower gain was accepted by Order of the Administrative Law Judge, FCC 72M–1339, released October 27, 1972. With respect to its allegations regarding the

[8] The engineer's letter states in pertinent part that, "Whether any given tower can safely be extended . . . and, in addition, support the equipment mentioned above, should be verified by a thorough stress analysis. . . ."

structural capacity of the tower, Hunt has relied on an opinion which does not support his factual allegations. As pointed out in the oppositions, the letter merely suggests that a stress analysis should be made, but does not indicate that the tower cannot be utilized as proposed.[9] Thus, there is no adequate basis for adding the requested issue. *Erway Television Corp.*, 2 FCC 2d 1037, 7 RR 2d 538 (1966).

12. Accordingly, IT IS ORDERED, That the petition to dismiss, filed November 6, 1972, by Lexington County Broadcasters, Inc., IS GRANTED; and

13. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed September 5, 1972, by William D. Hunt, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

14. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine the efforts made by Lexington County Broadcasters, Inc. to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests;

(b) To determine whether Lexington County Broadcasters, Inc., has failed to comply with the provisions of Section 1.514 of the Commission's Rules by failing to report the matters specifically referred to in this Memorandum Opinion and Order in its application, and, if not, to determine the effect of such non-compliance on the applicant's basic and/or comparative qualifications to be a Commission licensee.

15. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and proof under issue (a) added herein SHALL BE upon Lexington County Broadcasters, Inc.; that the burden of proceeding with the introduction of evidence under issue (b) added herein SHALL BE upon William D. Hunt; and that the burden of proof under that issue SHALL BE upon Lexington County Broadcasters, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[9] In a recent Notice (Public Notice No. 90836, released October 11, 1972, *Filing of Supplemental Pleadings Before the Review Board*), we stated that the Board would closely scrutinize the justification advanced by a party filing a supplemental pleading before accepting its supplement because of the delays in the adjudicatory process resulting in our consideration of supplemental pleadings. Lexington County has filed with the Board a petition to dismiss Hunt's supplement to its reply to opposition. The Board will grant Lexington County's petition. We believe the information contained within Hunt's supplement could have been obtained earlier and included within its original request. To allow the supplement to serve the purpose of the original petition effectively renders meaningless the provisions in the Rules intended to provide a fair opportunity for another party to respond to allegations, and to avoid a proliferation of unauthorized pleadings. Rules 1.45 and 1.294. Orderliness, expedition and fairness on the adjudicatory process require that reasonable procedural limits be established and maintained.

F.C.C. 73-180

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint of
ANTHONY R. MARTIN-TRIGONA
against
WCIA-TV, CHAMPAIGN, ILL.; WAND-TV, DACATUR, ILL.; WICS-TV, SPRINGFIELD, ILL.; WICD-TV, CHAMPAIGN, ILL.

ORDER

(Adopted February 14, 1973; Released February 27, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER REID ABSENT.

1. The Commission has before it an Application for Review filed on April 17, 1972 by Mr. Anthony R. Martin-Trigona of the ruling of the Broadcast Bureau of March 16, 1972, 34 F.C.C. 2d 118 (1972).

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[Re: Complaint of Anthony R. Martin-Trigona]

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

UTILITY ADVERTISING

The majority decides this case today on flimsy procedural grounds rather than face up to the need for a substantive ruling on the problem of utility advertising. Since both our staff and the trade press inform us that this case is but the first in a number of such forthcoming complaints, we would do well to resolve these issues today. We do not, accordingly, I dissent.

The specific complaint in this case is against four Illinois television stations (WICD, WICS, WAND and WCIA) and refers to paid advertisements broadcast on behalf of the Illinois Power Company (IPC) advocating the increased use of electrical energy. Such an advocacy, claims Mr. Martin-Trigona, flies in the face of the stance IPC takes in attempting to justify a 15% rate increase to taxpayers by referring to a "costly expansion program of new construction" said to be required because of rising use of electrical energy. The pendency

of that rate increase plus the potential increase in pollution caused by greater usage should indicate to even the most sanguine observer an issue controversial to the good citizens of Illinois.

Indeed, the four stations did not deny the controversiality of the issues as outlined by complainant. Rather they fell back on the time-worn response that these particular commercials did not contain any *explicit* reference to those issues. They claimed that to find discussion of controversy in a mere product advertisement extolling the virtues of using electricity would unleash a pandora's boxful of broadcaster nightmares, requiring responses to everything from furniture ads to auto ads to ads for any or all foreign imports. In doing so, they obfuscate the considerably more specific problem found in these ads.

It is crystal clear that the connection in this case between the advertising and the controversy is as great here as it was in the cigaret ad case, *Banzhaf*, —— F.C.C. 2d. —— (1970), or in the *Friends of the Earth* decision, —— F. 2d. —— (1971). But the Commission majority appears to sorrowfully regret the former and has never been willing to apply the court's reasoning in the latter to any other equally obvious situations, see my dissent in *Complaint of Allen Neckritz* (Chevron-F-310), on remand), —— F.C.C. 2d ——, at ——; and in this case they conveniently find a way not to decide the issue at all, by misapplication of the *Allen C. Phelps*, decision, 21 F.C.C. 2d 12 (1970).[1]

In *Phelps*, two separate complaints were lodged against the *entire content* of WTOP's news and public affairs programming alleging bias and failure to comply with the fairness doctrine on "a number of controversial issues" such as "home rule, public schools, crime, and . . . police brutality . . ." 21 F.C.C. 2d, at 13. The complaints were dismissed because "absent detailed and specific evidence of failure to comply with the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here." *Id.*

In dismissing Martin-Trigona's complaint, the majority relies on language in *Phelps* that requires a fairness doctrine complainant to "(a) specify the particular broadcast in which the controversial issue was broadcast, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his overall programing has not attempted to present opposing views on the issue." *Id.* But a search of the record and correspondence in this case reveals nothing of the generality and obfuscation that marked the *Phelps* complaints, and, indeed, tends to indicate that all three of the "requirements" have actually been satisfied by Mr. Martin-Trigona:

a) He has specified, as well as one member of the public possibly can, that the offending broadcasts occurred in a great many commercials over a short period of time over the four stations. It is perhaps ironic that, had he "estimated" the number of commercials at, say, 400, and named a few specific times, this number-conscious Commission might have been a bit more responsive to his complaint. He did not,

[1] Not only is the *Phelps* decision mis-applied in the original staff letter to Martin-Trigona, it is also mis-cited, at page 712 instead of page 12 of volume 21 of the F.C.C. Reports.

and he has rightfully stated that "a public citizen is not [or *should not be*] required to be a stenographer and provide transcripts of commercials or a per-se log of their air times, [especially] when a general attack is made on the entire scope and focus of an advertising campaign." Support for his point can easily be found in the *Friends of the Earth* case cited above.

b) There can be no question but that Mr. Martin-Trigona has sufficiently stated the position advocated in the advertisements—that of encouraging the use of greater quantities of electricity—and has ably made out a case for the position's controversiality.

c) Finally, Mr. Martin-Trigona has indicated in his allegations that the four licensees "had *never* afforded a forum for discussion of the controversial issues at point." Again, the point is an obvious one: if indeed the licensees had *never* presented opposing views on this issue, then the final *Phelps* criterion *must* be satisfied and the question of the issue's controversiality be adjudicated.

The majority simply ignores those unambiguous allegations, however, and "decides" that Mr. Martin-Trigona wasted his time prosecuting an essentially "frivolous" case. I cannot agree that he has not satisfied our threshold procedural requirements, and I believe he deserves an adjudication on the merits of his complaint. Any other solution would render our fairness complaints procedure completely meaningless vis-a-vis the average citizen, and therefore I dissent.

109 034—73——7

F.C.C. 73R–138

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of BOBBY R. OWENS, SR., 718 COLUMBIA LANE, DEER PARK, TEX. Order to Show Cause Why the License for Radio Station KQT–2259 in the Citizens Radio Service Should Not be Revoked	Docket No. 19164

APPEARANCES

Robert J. Montgomery, on behalf of Bobby R. Owens, Sr.; and *Vergil Tacy*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted March 27, 1973; Released April 3, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. Bobby R. Owens, Sr., is the licensee of Station KQT–2259 which is a Class D station authorized to operate in the Citizens Radio Service. He resides at 718 Columbia Lane, Deer Park, Texas.

2. The above-captioned proceeding was initiated by the Chief, Safety and Special Radio Services Bureau through the issuance on February 4, 1971, of an Order, addressed to the licensee, directing him to show cause why his license for Station KQT–2259 should not be revoked. The Order stated that on March 9, 1970, said station:

(a) was not identified by its assigned call sign at the beginning and conclusion of each transmission or series of transmissions, nor were the stations communicated with identified by call sign, in violation of Section 95.95(c) of the Commission's Rules;

(b) was used for the transmission of communications to another radio station on a frequency reserved for communications between units of the same Citizens radio station, in violation of Section 95.41(d)(2) of the Commission's Rules;

(c) was used as a hobby or diversion, *i.e.*, as an activity in and of itself, in violation of Section 95.83(a)(1) of the Commission's Rules;

(d) was used to communicate, or attempt to communicate, over a distance of more than 150 miles, in violation of Section 95.83(b) of the Commission's Rules;

(e) was used to communicate with another Citizens radio station for a period exceeding five consecutive minutes, in violation of Section 95.91(b) of the Commission's Rules;

(f) was used to communicate with another Citizens radio station without the observation of the prescribed five-minute silent period between contacts, in violation of Section 95.91(b) of the Commission's Rules;

(g) licensee failed to make Citizens radio station KQT–2259 available for inspection by an authorized representative of the Commission, in violation of Section 95.103 of the Commission's Rules;

(h) used a transmitting antenna which exceeded by more than 20 feet the height of the structure on which it was mounted, in violation of Section 95.37 (c) (2) of the Commission's Rules.

3. The Order to Show Cause stated further that said violations were brought to the licensee's attention by an Official Notice of Violation mailed on March 17, 1970, and a corrected copy thereof mailed on May 5, 1970; that the licensee has misrepresented to or concealed material from the Commission or was lacking in candor in his statement to the Commission in his response, received April 12, 1970, in reply to said Official Notice of March 17, 1970; that in view of the foregoing, the Commission would be warranted in refusing to grant an application filed by the licensee for a Citizens radio station license if the original application were now before it; that the licensee was notified on November 6, 1970, that he was liable to a monetary forfeiture of $100.00 under Section 510 of the Communications Act of 1934, as amended, for willful violations of Sections 95.83(b) and 95.41(d)(2) of the Commission's Rules, which forfeiture has not been paid; and that the Order was issued pursuant to Section 312(a) (2) and (4) and (c) of the Communications Act, and Section 0.331 (b) (8) of the Commission's Rules.[1]

4. The prehearing conference and the hearing on said Order to Show Cause were held in Houston, Texas, on February 14, 1972, before Administrative Law Judge Ernest Nash and the record was closed on that day. Owens appeared and was represented by counsel. On June 16, 1972, the Presiding Judge issued his Initial Decision (FCC 72D–41) in which he "concluded on the basis of the findings herein that the Bureau has failed to sustain its burden on any of the charges of violation which form the basis of the Order to Show Cause" or "as to the charge of misrepresentation and lack of candor." The matter is now before the Review Board on exceptions and brief, filed by the Bureau on August 1, 1972. No exceptions were filed by the licensee, nor did he file any opposition or reply to the Bureau's exceptions. No request for oral argument has been submitted by either party.

5. In his Initial Decision (FCC 72D–41), released on June 21, 1972, the Presiding Judge concluded that the only relevant testimony as to the events of March 9, 1970, came from James E. Wells (the FCC inspector) whose testimony (including voice identification) was insufficient to meet the burden of proof charged to the Bureau "either because it stands uncorroborated or, where corroborated, the facts do not constitute proof of violation." The Board has reviewed the Initial Decision in light of the exceptions, brief and its examination of the record herein. In general, the Board agrees with the factual findings of the Presiding Judge but disagrees with his intermediate and ultimate conclusions. In our view, the Bureau has sustained its burden of

[1] Section 312 of the Communications Act sets forth the grounds on which the Commission may revoke the station license. Section 0.331(b)(8) of the Rules delegates to the Chief, Safety and Special Radio Services Bureau authority to issue orders to show cause under Section 312 of the Act.

proof as to most of the charges set forth in the Order to Show Cause, and therefore established that revocation of Owens' license is warranted. Accordingly, except as modified in this Decision and in the rulings on exceptions contained in the attached Appendix, the factual findings of the Initial Decision, as supplemented by our findings, are adopted. To facilitate the understanding of our views, it is necessary and appropriate that we set forth the relevant facts in chronological order.

6. As is indicated above, the licensee, Bobby R. Owens, Sr., resides in Deer Park, Texas. Prior to March 9, 1970, Owens was or had been the President of the Almazon Corporation and the Plant Maintenance Corporation, engaged in the construction business. On the date of the alleged violations, Plant Maintenance was being "phased out". Almazon Corporation had been the licensee of a Special Industrial Radio Station whose transmitter was located at 210 North Richey Street, Pasadena, Texas.[2] That license expired in September, 1971. Almazon's right to do business in Texas was forfeited on August 12, 1968, for non-payment of the franchise tax; and thereafter, its charter was forfeited on June 9, 1969, and had not been reinstated as of January 12, 1972. With respect to Plant Maintenance, its right to do business in Texas and its charter were forfeited on April 9, 1971; and as of January 12, 1972, said charter had not been reinstated.

7. James E. Wells is an electronic engineer employed by the Federal Communications Commission at its field office in Houston, Texas. On the date of the hearing, he had been so employed for two years and seven months. His duties involved the inspection of radio equipment and the enforcement of the Commission's Rules and Regulations governing the use of radio in the Industrial, Citizens, Amateur and Broadcast radio services.

8. Prior to March 9, 1970, the Commission's office in Houston, Texas, had received complaints from people residing in Owens' neighborhood alleging that Owens was operating a radio station which was causing interference to stereos, "television interference, telephone interference, area interference" and that the station was being identified by a pseudonym. The complaints did not specify any call letters but did set forth Owens' address. Because of these allegations, the Houston office decided to investigate the charges. Accordingly, on March 9, 1970, Owens drove to Deer Park using an FCC automobile equipped for investigative purposes. He proceeded to monitor transmissions on the Class D Citizens Radio Service frequencies. He heard a strong signal indicative of overpower operation on the frequency 27.015 MHz (Channel 5) which is allocated to the Citizens Radio Service but only for use by units of the same station. Wells listened to the transmissions and tape recorded them simultaneously from 7:30 p.m. to 7:50 p.m. and from 8:35 p.m. to 8:50 p.m. No call signs were heard but the person transmitting the strong signal used the name "Lawyer". As set forth in paragraph 13, *infra*, containing a copy of the partial intercept, there were a number of references to cities in Mississippi.

[2] The transcript refers to "201 Richey" as Almazon's mailing address.

9. In addition to monitoring and recording the above transmissions, Wells used an S-meter—a signal strength meter—to determine the exact source of the transmission.[3] The customary procedure followed in the use of this equipment is to start at a point some blocks away from the suspected location of the unauthorized operation, drive toward the suspected station and observe the S-meter. As the station is approached, the reading will indicate higher signal strength; as the observer proceeds away from the station, the meter will indicate a lower signal. This procedure was followed by Wells on the night of March 9, 1970. He drove three or four blocks from Owens' house and then proceeded back toward it. As he came closer to the house and to the two antennas he saw adjacent thereto, the signal strength increased; as he drove away, the signal strength decreased. Wells made several of these runs and also drove past Owens' house and around the block on which Owens' house was located to determine the exact location of the monitored transmissions. He found no indication of any other transmissions by any other Citizens radio station.[4] As to the monitored transmissions, Wells obtained a maximum reading in front of Owens' house and again when he was behind Owens' house. The type of signals Wells was receiving indicated that "overpower" was involved.

10. Immediately upon cessation of monitoring, Wells parked his car across the street from Owens' house, locked his car and, after taking some necessary inspection equipment, went directly to Owens' front door. His knock was answered by Owens' son, a young boy 7–10 years of age, who invited Wells into the house and called his father. In about one minute, Owens came down a stairway from the upper portion of the house and, after Wells produced his credentials, he told Owens that he wanted to inspect his Citizens radio station. Owens showed Wells into a downstairs bedroom in which the only equipment were a Pierce-Simpson Guardian 23 Citizens Band transceiver and a microphone. After feeling the transceiver, finding that it was not warm, and noticing that it was not plugged into any current, Wells concluded that the transceiver had not been in recent use.

11. Wells also inspected the two antennas outside the house. The smaller of these, a ground plane antenna attached to the side of the house, had the only leads that entered the downstairs bedroom. These leads were connected to the equipment that Wells had just inspected and which he had determined was not the equipment operated during the monitoring which he had conducted. There was also another antenna mounted on a tall tower alongside the house. Wells estimated, by

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[3] This equipment has been found to provide the capability of determining, within a radius of 10 feet, the point from which a radio signal was emanating. *Richard U. Pattillo*, 34 FCC 2d 386, 24 RR 2d 68 (1972).

[4] Wells stated that he did not "recall seeing any type of Citizens Radio Service Station type of antennas in this neighborhood, or immediate area"; however, he did remember seeing one amateur radio antenna several blocks from Owens' house.

visual observation, that the height of this tower was about 50 feet from the ground. He was not certain whether the tower was attached to the house [5] but he did notice that it had two beam-type antennas horizontally positioned on the top of the tower. He also saw two large coaxial cables leading from the tall tower into the top of the house through the eave of the house. *Owens* testified, however, that these cables entered the downstairs bedroom approximately three feet above the ground.

12. Wells did not, at first, inform Owens that Wells had been monitoring prior to the inspection but he did ask Owens to allow him to inspect the equipment to which the large coaxial cables from the horizontal beam antennas were connected and to see where the cables led to inside the house. Wells wanted to inspect the upstairs rooms because the coaxial cables entered the eave at the top of the house. At this point, Owens told Wells that the inspection was terminated. Wells tried to explain that he wanted to see the other equipment in order to complete his inspection. He testified that "again, after he [Owens] asked me to leave, he opened the door and showed me the way out of his home, at which time he was directly behind me all the time." Outside the house, Wells requested permission to inspect Owens' mobile units and was told that he could return the next morning at 8:00 a.m. Wells did not return to the house after March 9, 1970, because he was convinced that the equipment which he had been shown was not that which had been used during his monitoring. Although the Presiding Judge restricted Bureau counsel's efforts to explore more fully Wells' identification of Owens' voice as the one which Wells had monitored, Wells did testify that Owens' voice did have certain characteristics, particularly his *accent*.[6]

13. On March 17, 1970, the Commission issued to Owens an Official Notice of Violations (corrected on May 5, 1970) charging him with noncompliance with the rules set forth in the Order to Show Cause, *supra*. Attached to the above Notice was an "intercept" containing a transcribed portion of the alleged conversation between Owens and an unidentified person. In said intercept, Owens is alleged to have used the pseudonym "Lawyer". The Intercept reads as follows:

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[5] According to Owens, this tower was affixed to his house, a two story building 33 feet in height.

[6] During the hearing, the Presiding Judge noted that Owens spoke "softly".

CITIZENS RADIO SERVICE—KQT 2259

LOCATION: 718 COLUMBIA LN, DEER PARK, TEX. MARCH 9, 1970

(Partial interception from 7:30 p.m. to 7:50 p.m.—8:35 p.m. to 8:50 p.m.)

1. Pseudonym

"Lawyer"	Hey Mississippi, where'd you go?
	Ah, negative ah, negative on that, I was on six a minute ago, I am in Texas.
Unidentified	(a laugh) Yes, I know, you loud mouth, boy, I'm telling you the truth, you got that thing wound up——
"Lawyer"	Yea, I'm huntin that cornhusker over there I'm huntin that cornhusker, I'm the cornhusker's britches duster—do you know that cornhusker. Yea you got the Lawyer down here in Houston, Texas—talk to me.
Unidentified	Yea, thats a 4 there Lawyer, yea I got you there, from what I understand tho there the cornhusker there, they took his uh equipment to D.C., how about that it.
"Lawyer"	Ha, Ha, Ha. No he was in there fat mouthing this evening.—The West Coast was giving me 10–5's this evening.
Unidentified	I shore xxxxxxxxxx understood there that about 10 days ago they knocked on his door and left him empty there.——
"Lawyer"	Goodness, that makes me think here, yea I better idle my motor down here that motor running too fast, roger.
"Lawyer"	Yea, goodness, ah what part of Mississippi—you ain't around Greenville and Jackson are you——
"Lawyer"	Yea, Roger goodness the conditions changing on us there Mississippi. So we will stand by if you are still copying we will stand by here and hope to hook up you again. Take it easy, we clear down here in Houston.
"Lawyer"	Who is that over there in Mississippi raising all that cain. Ah who, is that over there who hadn't paid their dues.
"Lawyer"	Now Mustanger, Mustanger, how in the world are you going to get out of Mississippi you ain't talk to no Lawyer here.
"Lawyer"	A1, good evening Bricklayer, good evening Bricklayer, I just got down there and straightened me a cottonpicker out on Channel 5, I had me a cottonpicker up there in Magnolia, Mississippi I had him xxxxx get in line there, Roger.
"Lawyer"	Yea, Roger, thats a 10 Roger, doggone, that cottonpicker. I set some beans out and layed em up there horizontal and that cottonpicker been trying to nip at me ever since. That cottonpicker trying to dust my britches with my own doggone antenna there, come on.
"Lawyer"	Good gracious alive. I may have to tune this cottonpicker up a little bit, Bricklayer. (whistle) good gracious alive, I may have to tune this cottonpicker up a little bit. Um, come on skip, skip, skip. Ah, Lawyer going to be clear and standing by, Bricklayer.

14. On April 2, 1970, an "Answer" was filed by "Jack Miles, Attorney for Respondent-Licensee, Bobby R. Owens, Sr. d/b/a Plant Maintenance Corp., 2435 North Blvd. Building, Houston, Texas."

Said Answer refers to a letter of March 17, 1970, filed by James D. Wells, denies all violations and that an inspection was made, and states, among other things, that Owens was the licensee of an FM station with a tall antenna, used in his business of Plant Maintenance Corporation, which the inspector failed to distinguish from a ground antenna; that there were two radios; that the inspector suggested that "the cables would have to be torn out of the walls to make sure one radio was not attached to another"; and that said request was arbitrary and unreasonable. Further allegations stated that "the station viewed and inspected was a properly, legally licensed FM station" and that "the only tower exceeding the 20 ft. height is a properly, licensed tower from a FM station used in his business of Plant Maintenance Corporation."

15. In a Notice of Apparent Liability for Monetary Forfeiture, dated May 6, 1970 (subsequently corrected on May 18, 1970), addressed to Owens, the licensee was advised that he appeared to have incurred liability to a forfeiture of $100.00 for violation of Sections 95.83(b) and 95.41(d)(2) of the Commission's Rules. By letter dated May 26, 1970, Owens' attorney, Robert J. Montgomery, replied that because of the second Notice correcting the date of the violation, "it would be to the best interest of all concerned to stay any action on the entire matter." By letter dated November 6, 1970, Owens was offered the opportunity to settle the forfeiture by paying a reduced amount of $25.00 within 30 days. By letter dated November 18, 1970, Montgomery replied, stating that it was his and Owens' opinion that Owens' "best interest would be served by refusing your offer to compromise" and that Owens denied any violation on March 9, 1970, or on any other date. However, on February 14, 1971, subsequent to the issuance of the Order to Show Cause herein, Montgomery wrote to the Commission that he had been instructed by Owens "to enquire as to the possibility of paying the $25.00 forfeiture as offered in your letter of November 6, 1970." In a reply dated March 2, 1971, Owens was advised that said request was denied.[7]

16. In addition to Owens, the Bureau produced four witnesses. One witness testified with respect to Owens' radio operations on the night of March 9, 1970, and on previous occasions. Two witnesses testified concerning Owens' radio operations prior to said date but not on said date. One witness testified as to transmissions after said date. Their written statements, made prior to the hearing, were received in evidence without objection. Questions concerning various aspects of said evidence were raised by the Presiding Judge and counsel for the parties. These questions relate to hearsay evidence, background evidence, prior radio operations by Owens, evidence as to a pattern, plan or design followed by Owens in his operations, and evidence concerning voice identification. Accordingly, we deem it appropriate to set forth certain court rulings which have guided the Board in reaching

[7] The evidence with respect to the settlement negotiations entered the record through exhibits offered by the Bureau and received in evidence by the Presiding Judge without objection by Owens' counsel. Nevertheless, it should be pointed out that our determination herein is not based in any part on said settlement negotiations.

its determinations herein with respect to various portions of the above evidence.

17. As to hearsay evidence in connection with federal administrative proceedings involving public interest determinations, the United States Supreme Court stated in *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U.S. 126, 155 (1941):

> The argument of petitioners is not that the record contains no evidence supporting the findings but rather that this class of evidence must be ignored because not competent in a court of law. But it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed.

Further, "There is no procedural canon against the exercise of common sense in deciding the admissibility of hearsay evidence." *Dallas County* v. *Commercial Union Assurance Co.*, 286 F.2d 388, 397 (1961). See also *FTC* v. *Cement Institute et al.*, 333 U.S. 683, 705–706 (1948).

18. As to testimony evidencing a design or plan of operation, the view has been expressed that when the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. This, in turn, may be evidenced by conduct of "sundry sorts" as well as by direct assertions of the design. *Wigmore on Evidence*, Third Edition, Section 304. The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act designed or planned. *Wigmore*, *id.* 237. The acquisition or possession of instruments or other means of doing the act is admissible as a significant circumstance; the possession signifies a probable design to use; and the instruments need not be such as are entirely appropriate, nor such as were actually put in use. *Wigmore*, *id.* 238.

19. Even in the absence of a design or plan, the Courts have held that, under certain circumstances, evidence as to prior or subsequent activities may be introduced. Thus, the Supreme Court of the United States has held that "testimony of prior or subsequent transactions which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transaction under scrutiny." *Federal Trade Commission* v. *Cement Institute et al.*, 333 U.S. 683, 705, 68 S. Ct. 793, 805, 92 L.Ed. 1010 (1948), and citations listed therein. Although the above excerpt was cited as the "established rule" by the U.S. Court of Appeals in Local Lodge No. 1424, *International Association of Machinists, AFL–CIO et al.* v. *N.L.R.B.*, 264 F.2d 575, 105 U.S. App. D.C. 102, that Court went on to say:

> . . . This rule is, of course, subject to the important qualification that testimony as to such barred events may be received only as background evidence and may not be given independent significance. See Paramount Cap. Mfg. Co. v. N.L.R.B., 8 Cir., 1958, 260 F.2d 109. Put in another way, there must be acts occurring within the six-month period of sufficient status to constitute the violation charged, and evidence of acts outside the period can be received only to illuminate and explain the events within the period.

20. Also available for our consideration are certain presumptions recognized in law, *i.e.*, the "continuity presumption and the backward

relation presumption." It has been held that the continuity presumption (if a situation exists at one point in time, it is to be presumed that it exists thereafter) and backward relation presumption (if a situation exists at one point of time, it is to be presumed that it existed before that time) constitute reasonable grounds on which to draw inferences where (1) a situation or the circumstances surrounding it do not go through an apparent material change and (2) the lapse of time is not great enough to suggest that unknown circumstances or causes in the normal course of events, will have changed the situation. *McFarland* v. *Gregory*, C.A.N.Y. 1970, 425 F.2d 443. As will be seen hereinafter, the situation before us lends itself to the application of these presumptions.

21. In the instant case, Section 312(d) of the Communications Act provides that "In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission." Thus, with respect to the alleged rules violations by Owens, it was incumbent on the Bureau to adduce evidence to prove that Owens engaged in the prohibited activities on March 9, 1970. Testimony with respect to Owens' radio activities prior to and after said date, even though accepted without objection by Owens' counsel, will be considered only as background information and not for the purpose of determining the events of March 9, 1970.[8] If the Bureau sustains its burden with respect to such latter events by proof other than the background evidence, such background evidence can then be considered in accordance with the holdings of the Courts.

22. One of the complainants, Richard Coleman, a neighbor of Owens who resides at 725 Columbia Lane, Deer Park, Texas, was called as a witness by the Bureau. In a letter to the Commission's Houston office, dated March 13, 1970, signed by Coleman and his wife, they had alleged that Owens' radio operations were causing interference to their television reception; that such interference had taken place on March 9, 1970, about 8:45 p.m. and on Wednesday, March 11, at 9:00 p.m.; that they recognized Owens' voice; that for some years they had been receiving radio interference except when Owens was away; that although they never heard Owens use call letters, he used various code names; that on January 4, 1970, they "took notes" of a conversation heard on their television receiver between Owens and one, Jerry Decebo, River, California; and that "Mr. Owens, after consulting his wife, gave the address that Mr. Decebo should use when writing him as 13342 Knollcrest, Houston, Texas."

23. Coleman testified that by letter and telephone he had complained to the Commission about interference caused by Owens' radio operations to Coleman's television reception. This interference was reflected in lines across his television screen and in losing the sound and picture. During these occurrences, he would hear Owens' voice. Coleman's television set was located in his front bedroom and from that room he could see the window of the room on the upper floor of

[8] Background information was stipulated by both counsel and was so identified during the hearing.

Owens' house. Coleman observed over a two-week period that whenever the above-described interference took place, he would see the light blink or flicker in Owens' upstairs room. Coleman and his wife maintained a log on said interference and each time that it occurred, they wrote down the dates, time of day and type of interference. Coleman was able to "pinpoint" the interference to his television reception at 8:45 p.m. on March 9, 1970, because it was so entered in his log. In addition to television interference, Coleman also had experienced interference to his telephone line when he heard Owens' voice while Coleman was using his own phone. As the basis for his identification of Owens' voice, Coleman testified that he had talked to Owens on two different occasions and would recognize his voice.

24. The Bureau also called as a witness another neighbor of Owens, John L. Rivard, who had complained to the Commission by letter dated March 15, 1970. Rivard resided at 726 Columbia Lane, Deer Park, Texas. In his letter, also signed by his wife, Rivard referred to his prior telephone calls to the Houston office and stated, in pertinent part, that Owens was operating his radio equipment "at such power levels and in such manner as to *destroy* normal television reception in many of the surrounding residences, including 726 Columbia Lane (my residence)"; that such interference was also experienced on stereo and on the telephone; that Owens had been causing said interference for approximately three years; that Rivard's efforts to discuss the situation with Owens had resulted in Rivard's arrest on Owens' charge of disturbing the peace; that said charge had been dismissed by the Presiding Judge;[9] that during times of interference, Owens' outside antenna could be observed to be changing directions; that Owens did not use call letters but identified himself as "Green Hornet" and "Lawyer No. 5": that Owens broadcast range, as monitored by Rivard, included North Carolina and Oklahoma; and that Rivard could identify Owens' voice "from *accent* and vocabulary." Attached to the letter was a transcript made by Rivard of excerpts of transmissions by Owens, heard on Rivard's television set at 8:20 p.m. on March 15, 1970.

25. Rivard, a department manager for the Shell Chemical Company, testified, in pertinent part, that he was trained "only to the extent of this, a two-[way] radio in the company equipment [KTD-405 licensed to Shell Company] which I am called upon to use, and we were properly instructed with FCC literature on the use of call letters, in the use of that equipment." He stated further that he had been receiving interference on his television set since 1967; that he attributed said interference to Owens because of "interference, along with the presence of an antenna in the yard of Mr. Owens' residence, along with correlations between the simultaneous interference on my television and Mr. Owens' antenna being rotated, which I assumed to be in a direction-finding technique or direction technique"; that on several occasions he telephoned Owens to complain about the inter-

[9] Although all of the complaint letters were received in evidence without objection, reception of Rivard's letter was particularly urged by Owens' counsel on the ground that it showed prejudice on the part of Rivard.

ference; that when Owens answered the telephone and talked with Rivard, the interference to Rivard's television set "no longer existed"; that after one such incident, Rivard's conversation with Owens "continued out into the street"; that Rivard's identification of Owens' voice was "based on accent, vocabulary, the fact that I have heard that voice over my TV set, I heard it in the courtroom, I heard it in our discussions in the street, and our discussions on the telephone. And in my opinion, that voice, I can identify that voice as the operator of a radio or some type of equipment causing interference"; that on March 9, 1970, Owens' antenna was on a tower that "extended an estimated twenty foot; twenty-five above his roof line"; that when Owens' antenna was rotating, "it would move as much as sixty-five and seventy degrees in the general vicinity of parallel to the street"; that the interference was experienced on Rivard's two television sets, both black-and-white and both less than one year old; that for a period of time, there was only one other antenna like Owens' in the neighborhood, about three or four blocks removed; and that several other neighbors had identified Owens' voice on their television sets.[10]

26. The Bureau also called as a witness another neighbor of Owens, Charles Gurney Nelson, Jr., who had complained to the Commission in a letter dated March 17, 1970. Nelson resided at 742 Dartmouth Lane, Deer Park, Texas, which is located about 100 yards from Owens' house. In his letter, Nelson stated, in pertinent part, that a radio station in the immediate area near his home had caused interference to the operation of the Military Affiliate Radio System Station AF4IPO while Nelson was running phone patches to Vietnam during the summer months of 1968; that he contacted Owens by telephone and told him that he was interfering with an official U.S. Government radio station by the use of his Citizens Band transmitter; that as a result of said call, the interference ceased for a short period of time; and that during the past two years, Nelson had received television interference from a Citizens Band radio station even though his television set was equipped with a Drake high pass filter.

27. At the hearing, Nelson testified, in pertinent part, that he was a radio engineer and that he held an FCC First Class Radio Telephone License with a Ship Radar Endorsement and also an Advanced Class Amateur License; that the first time he had talked face-to-face with Owens was when Owens came to Nelson's house to request him to help Owens become an amateur radio operator; that later Owens again came to Nelson's house and spoke to him about radio matters; that between May, 1968 and May, 1969, Nelson was a member of the U.S. Air Force Military Affiliate Radio System (MARS), authorized to operate on military frequencies under military regulation and control; that in connection with MARS, he used a transceiver of the latest design, exceptionally well-shielded and one which would not be expected to receive interference; that during his MARS operation, he experienced radio interference which he recognized as Owens' voice because he had met and spoken to him previously, because of the

[10] This statement was made on cross-examination in direct response to a question asked by Owens' counsel.

strength of the signal, and because he had heard Owens "operating on the air"; that he telephoned Owens and could hear the telephone ringing over Owens' radio; that after a discussion with Owens about the interference, Owens stopped operating his radio and the interference ceased; that during the past two years he had received interference to his television reception which he had reported several times; that he could identify Owens' voice on his television speaker; that in addition to hearing Owens' voice, he saw "the continuous lines of carrier, plus you could see modulation on the screen"; that he had a high-pass filter on his TV set, attached within two inches of his antenna, and his set was grounded; and that if Owens "was running within the legal power limits of CB radio, and his equipment properly tuned, and I had a high-pass filter on my TV set, I normally shouldn't have picked it up." [11]

28. The Bureau also called as a witness Alton Earl Tschirhart, an electronic technician who holds a First Class Radiotelephone Operator License, a First Class Radiotelegraph Operator License, and an Amateur Extra Class Radio Station and Operator License. He testified that he had been to Owens' house two or three times and had serviced Owen's radio equipment before and after March 9, 1970; that shortly after said date, Tschirhart worked on two amplifiers for Owens in an upstairs room; that there was a considerable amount of radio equipment there, including transmitting equipment, "some of which was used, some which wasn't in operation"; that there were a DeWalt Citizens Band radio, separate transmitter, receiver, and Knight amplifier,[12] and a Henry 2K or 2K3 multiband amplifier designed for amateur radio operation on five bands; [13] that said amplifier was connected to the Citizens Band transmitter; and that on one occasion Tschirhart saw Owens operating his Citizens Band transmitter with the antenna connection and heard him communicating with someone identifying as "The Preacher".[14]

29. Owens was first called as a witness by the Bureau pursuant to Rule 43(b) of the Federal Rules of Civil Procedure.[15] In addition to providing certain facts set forth above, Owens testified that he was engaged in the construction business as president of two corporations, one of which—the Almazon Corporation—owned the equipment. The other was the Plant Maintenance Corporation which, he stated, was being phased out on March 9, 1970, and was not doing any work. One of the corporations was the licensee of an FM radio station in the *Special Industrial Radio Service* located in *Pasadena, Texas*. Owens stated that on March 9, 1970, there were no units of said station installed at his residence in Deer Park, Texas, or at any

[11] Nelson had received interference to Channel 2 from the power line as well as from Owens.

[12] The witness testified that this amplifier "takes a 5-watt CB set, the output power which is anywhere from two and one-half to five watts, depending on the CB set, and it boosts the output, RF output, to anywhere probably thirty to sixty watts output."

[13] As stated by the witness, "it amplifies . . . anything from 10-watts to 60-watt signals to any amount of power from 100-watts to a 1000-watts output, depending upon the amount of drive of the transmitter."

[14] During his cross-examination, and in answer to questions posed by Owens' counsel, the witness testified that he had engaged in transmissions with Owens and others contrary to the Commission's Rules.

[15] This section provides for the interrogation of any unwilling or hostile witness, or of an adverse party.

other point and that on said date he was not using said station in connection with any business activity.[16] As a witness for the Bureau, he did not unequivocally deny that on March 9, 1970, he was in fact on the air operating Citizens Band Radio Station KQT–2259; rather, twice he answered a question designed to determine that fact by stating "To the best of my knowledge, I don't remember." That same morning he had listened to the tape recording of the intercept attached to the above Official Notice of Violation and when asked "will you state whether or not that is your voice on that tape?", he replied "I don't recognize the voice." In reply to a question concerning the type of antenna he used on March 9, 1970, in connection with his Citizens Band radio, he replied "I don't remember what type of antenna I had at that time." On the date of hearing, he stated, he had only a monitoring antenna but he "couldn't" and "wouldn't have any idea" as to "how high it is or approximately how high that antenna is." On March 9, 1970, he did have two antennas, but as to height, his answer was "No, I don't recall." After some prodding questions from the Presiding Judge, Owens stated that he had purchased and installed an already assembled, crank-up tower but did not "have any idea how tall it is"; that it was somewhat taller than his house; [17] and that his two-story house was about 33 feet in height. He had "no idea how tall the tower was above the house" but stated that it had been replaced with a TV antenna pole. He could not remember the date when the replacement took place. All he had on the date of hearing was a monitoring antenna with a "receiver on it." [18] He stated further that the cable from his tower monitor entered the wall of his house "about three foot off the ground."

30. In further response to Bureau counsel's questioning, Owens stated that he was no longer transmitting; that "I don't remember the last date or anything" as to when he last engaged in transmitting but would say "it has been six months, approximately"; that on March 9, 1970, the only radio transmitting equipment he had at home, and in his downstairs bedroom, was a Pierce Simpson Citizens Band transmitter which was connected to a ground plane antenna "on the side of the patio" but could not recall the height; that on said date he was not using his business radio for transmitting; that he had no radio transmitting equipment of any kind in his upstairs bedroom; that when he first received his license, he had his Citizens Band equipment upstairs but later moved it downstairs; that he had "owned other rigs" which had been located in his downstairs bedroom; and that he did, on the above date, have a mobile transmitter, but that it was not installed in any vehicle.

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[16] Compare with Owens' "Answer" of April 2, 1970, to the Official Notice of Violation wherein Owens stated that he had "an FM properly licensed station with a tall antenna which apparently the inspector failed to distinguish . . ." and that "the only tower exceeding the 20 ft. height is a properly licensed tower from an FM station used in his business of Plant Maintenance Corporation."

[17] Later, Owens stated that his tower "barely exceeds the roof."

[18] Later, however, Owens stated that on the *date of inspection* his crank-up tower "wasn't connected to anything. It was connected to a monitor, a county monitor, which monitors county Fire Department, Sheriff's Department." Still later he reiterated that the tower-monitor connection existed on the inspection date.

31. Owens was later recalled by his own counsel. Unlike his prior testimony, Owens had no trouble remembering those matters concerning the inspection which his counsel sought to elicit. Within the 10 pages of his testimony, not once did he "not remember" and let such an answer stand on the record. His selective recall was obvious. He testified, in pertinent part, that the upstairs bedroom (in which Coleman had observed flickering lights during television interference) was "partially" covered by an air conditioner; that, in addition to Nelson's antenna, there are two CB antennas in the area, about three blocks from Owens' house; that he never transmitted on the upstairs equipment identified by Tschirhart; that subsequently, said equipment was moved downstairs; that on March 9, 1970, there was no radio transmitting or monitoring equipment in the upstairs bedroom; that the only radio equipment he had was what was seen by Wells in the downstairs bedroom;[19] that a few days before Wells' inspection, Owens' wife had had a mental breakdown; that he had told Wells that his wife was sick and for that reason he asked Wells to return the next morning; and that the equipment he bought from Tschirhart consisted of "Code Oscillator to send Morse Code with."

32. The Board is of the view that, on the basis of substantial evidence in this record, a Citizens Band transmitter was in operation in Owens' house on the night of March 9, 1970, and that Owens was the operator. Following standard procedures and using technical equipment capable of identifying the source of the transmissions, Wells was able to determine that the only signal he was receiving on the frequency 27.015 MHz came from Owens' house. This frequency is allocated to the Citizens Radio Service and Wells found no indications of any other transmission by any other Citizens radio station. Wells is qualified by training and experience to reach the determination that the source of the signal he was receiving came from Owens' house. No evidence was offered by Owens controverting the procedures followed by Wells.

33. Wells did not see Owens operating his Citizens radio station. Accordingly, if the charges against Owens are to be sustained, it is necessary that substantial evidence exist to support a finding attributing the monitored signals to Owens. We believe that such evidence does exist in this record. Wells heard the transmitting voice monitored on March 9, 1970, from 7:30 p.m. to 7:50 p.m. and from 8:35 p.m. to 8:50 p.m., for a total of 35 minutes. He parked his car opposite Owens' house and in a matter of minutes was conversing with him. Thus, with a minimal intervening time lapse, Wells was able to compare the voice on the air with the voice of Owens. In addition, within the week following the date of monitoring and inspection, Wells listened to the tapes made of the transmissions for the purpose of preparing the intercept and was in a position to compare the voice he heard on the tapes with the voice of Owens as heard in Owens' house. Finally, Wells listened to the tapes shortly prior to the date of hearing and was in a position to compare the transmitting voice

[19] Compare with his reply to Bureau counsel that on March 9, 1970, he did have a mobile transmitter which was not installed in any vehicle.

with that of Owens at the hearing. Wells is an electronics engineer who has conducted hundreds of inspections and is trained in the use of radio and taping equipment and in the identification of voices heard during monitoring operations. Although he was unduly restricted in his testimony in this respect, he did state that Owens' voice had particular characteristics, including his accent. Standing alone, Wells' identification of Owens' voice as the one emanating from Owens' house on the night of March 9, 1970, constituted a *prima facie* showing as to that fact.

34. There is further support for Wells' identification of Owens' voice on the monitored transmissions. Coleman, a close neighbor of Owens, knew Owens and had talked to him on two occasions. Thus, Coleman was familiar with Owens' voice and testified that he recognized it as the one which he had heard on his television set and on his telephone line. As set forth above, Coleman and his wife maintained a written log in which they entered interference each time it occurred, setting down the dates, time of day and type of interference. This log contained an entry that Owens had caused interference to Coleman's television reception at 8:45 p.m. on March 9, 1970, the date of Wells' inspection. The "8:45 p.m." time coincided with Wells' testimony that he had heard Owens transmitting on said date from 8:35 p.m. to 8:50 p.m.

35. There is still further support for Wells' voice identification in the testimony of Rivard, another close neighbor of Owens. Putting aside, for the moment, said testimony with respect to interference at times other than March 9, 1970, nevertheless, we can consider and weigh Rivard's testimony concerning the characteristics, if any, of Owens' voice. Rivard's complaint letter to the Commission, dated March 15, 1970, was received in evidence as Bureau's Exhibit 12 at the particular urging of Owens' counsel. In said letter, Rivard stated that he could identify Owens' voice on the basis of his accent and vocabulary. As a witness, Rivard confirmed this identification, stating that it was "based on accent, vocabulary, the fact that I heard that voice over my TV set, I heard it in the courtroom, I heard it in our discussions in the street, and our discussions on the telephone." We believe that Rivard's testimony and Wells' testimony clearly establish that Owens' voice did have identifiable characteristics, *i.e.*, vocabulary and accent.

36. In *Richard U. Pattillo*, *supra*, the Board set forth certain accepted principles concerning voice identification and cited supporting precedents. It is clear from these principles and precedents that in the type of case before us, voice identification is not limited to "voice experts" and that the Presiding Judge was too restrictive in his approach to Bureau counsel's efforts to explore this area. Opinion evidence is acceptable; the question is one of weight. Thus, in the *Pattillo* case, among the deficiencies in voice identification there found was the fact that almost seven months had passed between the time an inspector heard the monitored voice and the time he first spoke to the alleged speaker on the telephone. In the case before us, the inspector spoke to Owens within minutes after he heard the voice on the air. Further, in *Pattillo*, the voice was found not to have any "unusual accent, pronunciation or inflection." In the case before us, we have the established fact as to the characteristics, *i.e.*, vocabulary and accent, of Owens' voice.

As we stated in *Pattillo*, "An identification may be made on the basis of the witness' then existing familiarity with the voice, or on the basis of subsequent conversation with the speaker and a retroactive recognition of the voice used in the antecedent conversation." We also listed various factors to be considered in evaluating evidence as to voice identification and pointed out that these factors "affect the weight rather than the competency of the evidence." Considering all of the above, it is our view that an extremely strong showing was made that the voice heard by Wells on the night of March 9, 1970, was Owens' voice and that it was incumbent on Owens, if he desired to overcome such showing, to produce substantial evidence to controvert it.

37. A careful review of the record reveals that Owens failed to make the required rebuttal showing. On the contrary, considering his testimony as a whole, it can be urged that he failed to deny that he operated his Citizens radio station on the night of March 9, 1970. His testimony in this respect was guarded, equivocal and, in a way, inconsistent. Thus, when he first took the stand on call of the Bureau, he stated that, to the best of his knowledge, he did not remember whether he was operating his station on the above date. He did not deny that the voice on the tapes was his but, instead, said "I don't recognize the voice." He stated that on March 9, 1970, the only radio transmitting equipment he had at home was a Citizens Band transmitter and that there were no units of his Special Industrial Radio station at his residence, nor was he using said station on said date; yet, in his "Answer" to the Official Notice of Violation he gave the impression that he may have been operating his Special Industrial Radio station at his home on March 9, 1970. Finally, even when called and questioned by his own counsel, Owens did not deny that he was transmitting on his Citizens radio station on the night of March 9, 1970. The only testimony he gave in that direction was the statement that there were two or three other "CB antennas" about three or more blocks from Owens' house. On the other hand, Wells testified that within said area, he found no transmissions on the Citizens Band frequencies other than those emanating from Owens' house, and this testimony stands unrebutted on the record.

38. Aside from all other matters of record, it is our conclusion that, on the basis of the evidence relating to the events of March 9, 1970, the Bureau has met its burden of proof under Section 312 of the Communications Act and has shown by substantial evidence of record that on the night of March 9, 1970, Owens was operating his Citizens Radio Station KQT–2259 in violation of Sections 95.95(c), 95.41(d)(2), 95.83(a)(1), 95.91(b) and 95.103 of the Commission's Rules; that, as alleged in the Order to Show Cause, Owens misrepresented to or concealed material from the Commission and was lacking in candor in his statement to the Commission in his response, received April 12, 1970, in reply to the Commission's Official Notice of March 17, 1970; that Owens has failed to pay the monetary forfeiture of $100.00 of which he was notified on November 6, 1970; and that in view of the foregoing, the Commission would be warranted in refusing to grant an application filed by the licensee for a Citizens radio station if the original application were now before it. Because of the debatable nature of the evidence

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with respect to the height of Owens' antenna and with respect to the distance of his transmissions, we have not drawn any conclusion adverse to Owens with respect to the alleged violations of Sections 95.83 (b) and 95.37(c) (2) of the Commission's Rules.

39. Our conclusions, arrived at independently therefrom, are buttressed by the testimony of Coleman, Rivard, Nelson and Tschirhart. As the U.S. Court of Appeals held in *International Association of Machinists*, *supra*, the testimony of said witnesses can be received as background evidence and "to illuminate and explain" the events of March 9, 1970. Although we need not take such a position in this case, suffice it to say that the totality of all of the evidence appears to be consistent with the principles set forth in *Wigmore*, *supra*, with respect to evidence of a design or plan as shown by Owens' operations on March 9, 1970, and at times before and after said date. Without repeating the above-described testimony of said witnesses, it is clear that for a number of years Owens was engaged in unauthorized operations similar to those proven by the Bureau to have taken place on March 9, 1970. While these collateral operations are not the subject of charges in the instant proceeding, they are being given that consideration permitted by the Court holdings.

40. In its Exceptions, the Bureau emphasizes Owens' conflicting testimony, his selective recall of events, his equivocal responses and his lack of candor. In general, these conclusions are reflected in the Bureau's Exception No. 12 wherein it requests the following finding:

> Initially, as stated above, Owens replied to the Official Notice of Violation stating the antenna on the tower was for use with his 'FM station used in his business of Plant Maintenance Corporation' (Bu. Ex. 2, p. 2) and that Wells suggested that 'the cables would have to be torn out of the walls' and this was why he would not allow Wells to inspect further (Bu. Ex. 2, p. 1). In an answer dated September 16, 1971, to certain interrogatories propounded concerning that reply, Owens stated that he adopted it as his own, as it was further so stipulated at the hearing (Tr. 9). However, at the time of the hearing, Owens testified that there was no unit of his Special Industrial radio station installed at his home on March 9, 1970 (Tr. 19); that, on or about March 9, 1970, he was not using the Special Industrial license in connection with any of his business activities (Tr. 22); that Plant Maintenance Corporation had never been a licensee of the Commission but the license for the Special Industrial station was issued to Almazon Corporation (Tr. 19, 20); that, on or about March 9, 1970, neither corporation was actively engaged in business (Tr. 16, 20); that, on or about March 9, 1970, the only transmitter he had in his home was a Citizens Band transmitter in the downstairs bedroom which was connected to the ground plane antenna on the side of the house (Tr. 30–31); that, on or about March 9, 1970, the tower antenna was connected to a receiver that monitored the fire and sheriff's departments (Tr. 32); that the cable from that tower extended through the side of the house, three feet above the ground, into the downstairs bedroom window, where it would be clearly visible to any FCC inspector (Tr. 33, 35); that when he first got his license he only had the Pierce Simpson Citizens Band transmitter in the upstairs bedroom but he later moved it downstairs (Tr. 33–34); that he never transmitted on the equipment that Tschirhart repaired for him (Tr. 169); and that the reason he did not allow Wells to inspect further the night of March 9, 1970, was because his wife was very sick (Tr. 171). It is found that all of the aforementioned statements by Owens were contradicted by his own prior statements or the testimony of witnesses at the hearing.

41. We are granting the above exception and the conclusions drawn therefrom. Conflicts in the testimony of a witness, misrepresentation, equivocation and lack of candor adversely affect the weight to be given by the decisional authority to the testimony of the witness. *Falsus In Uno, Falsus In Omnibus.* If the testimony of a witness on a material issue is wilfully false and given with an intention to deceive, the trier of the facts may disregard all of the witness' testimony. *Black's Law Dictionary*, Fourth Edition. This maxim relates to the weight to be given to the evidence in question. We need go no further in this connection than to note that the adverse effect on the weight to be given to Owens' testimony constitutes additional support for our conclusions set forth above and reinforces our ultimate conclusion that the public interest would be served by revocation of Owens' license.

42. In the proceedings conducted by the Commission *In the Matter of Amendment of Part 19, Citizens Radio Service, etc.*, FCC 60–515, 19 RR 1554 (1960), the Commission stated:

> . . . An examination into the history of the Citizens Radio Service and the proceedings and reports of more than 15 years ago which led to the establishment of the service on a formal basis, effective December 1947, clearly indicate the Commission intended the service to fulfill a need or requirement of communications in connection with either personal or business activities and not as a toy for the amusement of the operator. The Commission has repeatedly emphasized this concept during the intervening years. The rule changes previously adopted in this proceeding do not alter this intention in any manner, but are directed solely to those relatively few licensees who want to use their citizens radio stations as a toy or hobby in and of itself, and make the Citizens Radio Service into an examination-free amateur band.

While the sanction imposed on the licensee may appear harsh, it must be noted that because of the hundreds of thousands of licensees engaged in operations in the Citizens Radio Service, the Commission must rely on voluntary compliance with its regulations. As the Commission pointed out in *Vincent R. Banville, Sr.*, FCC 63–1004, 1 RR 2d 475, 482 (1963):

. . . It is apparent, in a mass radio service such as the Citizens Radio Service, that violations, which viewed singly may seem somewhat trivial, somewhat technical, or somewhat minor, become in a repetitive pattern, whether by individuals or groups of individuals, very destructive to the effective use of these radio frequencies by the many thousands of licensees involved.

43. Accordingly, IT IS ORDERED, That the license of Bobby R. Owens, Sr., for radio Station KQT–2259 in the Citizens Radio Service IS REVOKED, effective May 18, 1973; and that a copy of this Order of Revocation SHALL BE served by Certified Mail, Return Receipt Requested upon Bobby R. Owens, Sr., at his last known address, 718 Columbia Lane, Deer Park, Texas; and

44. IT IS FURTHER ORDERED, That operation of radio Station KQT–2259 SHALL BE TERMINATED upon the effective date of the license revocation specified above, and that, immediately upon such

effective date of such license revocation, the licensee SHALL FORWARD his radio station license to the Commission for cancellation.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON,
Member, Review Board.

NOTE.—Operation of the radio station specified above after the effective date of license revocation as ordered herein will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person operating such station to the penal sanctions specified in Section 501 of the Communications Act. Within thirty days of the release date of this Order of Revocation, a petition for reconsideration thereof by the Review Board may be filed pursuant to the provisions of Section 1.106 of the Commission's Rules, 47 CFR 1.106, or an application for review thereof by the Commission may be filed pursuant to the provisions of Section 1.115 of the Commission's Rules, 47 CFR 1.115.

APPENDIX

RULINGS ON EXCEPTIONS OF THE CHIEF, SAFETY AND SPECIAL RADIO SERVICES BUREAU

Exception No.	*Ruling*
1–17, inclusive	*Granted* in substance.
Conclusions	
1–7, inclusive	*Granted* in part, as set forth in the Decision, and *denied* in part, for the reasons set forth in the Decision.

F.C.C. 72D-41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of BOBBY R. OWENS, SR., 718 COLUMBIA LANE, DEER PARK, TEX. Order to Show Cause Why The License For Radio Station KQT-2259 in the Citizens Radio Service Should Not Be Revoked	Docket No. 19164

APPEARANCES

Robert J. Montgomery, Esq., on behalf of Bobby R. Owens, Sr.; and *Vergil Tacy, Esq.*, on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

(Issued June 16, 1972; Released June 21, 1972)

1. An Order to Show Cause why the above captioned license should not be revoked was adopted and released by the Chief, Safety and Special Radio Services Bureau on February 4, 1971. This Order was adopted on the basis of violations of the Commission's Rules governing the Citizens Radio Service said to have been committed by Bobby R. Owens, Sr.

2. It was charged that on March 9, 1970, Citizens radio station KQT-2259, Owens' licensed facility, ". . . was not identified by its assigned call sign at the beginning and conclusion of each transmission or series of transmissions, nor were the stations communicated with identified by call sign, in violation of Section 95.95(c) of the Commission's Rules;" ". . . was used for the transmission of communications to another radio station on a frequency reserved for communications between units of the same Citizens radio station, in violation of Section 95.41(d)(2) of the Commission's Rules;" ". . . was used as a hobby or diversion, i.e., as an activity in and of itself, in violation of Section 95.83(a)(1) of the Commission's Rules;" ". . . was used to communicate, or attempt to communicate, over a distance of more than 150 miles, in violation of Section 95.83(b) of the Commission's Rules;" "was used to communicate with another Citizens radio station for a period exceeding five consecutive minutes, in violation of Section 95.91(b) of the Commission's Rules;" and ". . . was used to communicate with another Citizens radio station without the observation of the prescribed five minute silent period between contacts, in violation of Section 95.91(b) of the Commission's Rules."

3. It was further charged that Owens "failed to make Citizens radio station KQT–2259 available for inspection by an authorized representative of the Commission, in violation of Section 95.103 of the Commission's Rules;" and that ". . . the transmitting antenna at Citizens radio station KQT–2259 exceeded by more than 20 feet the height of the structure on which it was mounted, in violation of Section 95.37 (c) (2) of the Commission's Rules." These violations were also alleged to have existed or taken place on March 9, 1970.

4. An Official Notice of Violation was mailed to Owens on March 17, 1970. This Notice alleged that the violations had taken place on February 9, 1970. A response to this Notice, denying its charges, was filed by an attorney for Owens in a pleading received by the Commission on April 2, 1970. Another Notice of Violation was mailed to Owens on May 5, 1970. This Notice alleged that the violations had taken place on March 9, 1970. Attached to this Notice was a transcript of a monitored conversation.

5. On May 6, 1970, Owens was sent a letter constituting a Notice of Apparent Liability to Monetary Forfeiture. This Notice was sent on the basis of violations alleged to have occurred on February 9, 1970 and brought to Owens' attention by the Official Notice of Violation issued March 17, 1970.

6. On May 18, 1970, a second letter constituting a Notice of Apparent Liability for Monetary Forfeiture in the amount of $100.00 was sent to Owens. This letter concluded by saying:

> Your attention is directed to the Notice of Apparent Liability which was issued to you on May 6, 1970. It was alleged in that letter that the violations which form the basis of the present Notice of Apparent Liability occurred on February 9, 1970. Since the date of February 9, 1970, was taken from the date stated in the Official Notice of Violation, F.C.C. Form 793, mailed to you on March 17, 1970, and inasmuch as this date should have been March 9, 1970, you may ignore the Notice of Apparent Liability issued to you on May 6, 1970 . . .

Owens' lawyer responded to these two letters by letter of May 26, 1970. He pointed out the discrepancy as to the date of the alleged violations and requested that all action on the matter be stayed until this question was resolved. He invited further contact with him on the matter.

7. On November 6, 1970, Owens was offered an opportunity to settle by paying a reduced forfeiture of $25.00. This letter concluded by advising that ". . . if a radio station licensee fails to pay a forfeiture imposed by the Commission, the case, without further notice to the licensee, will be referred to the Department of Justice for prosecution in the appropriate Federal District Court to recover the amount of the forfeiture initially imposed."

8. Owens' lawyer responded with a letter dated November 18, 1970, in which he stated that he and his client had concluded that it would be in Owens best interest to refuse the offer to compromise. According to his lawyer, ". . . Mr. Owens completely denies any violation on March 9, 1970, or on any other date."

9. On February 14, 1971, counsel for Owens wrote to ask if he could pay the $25.00 after all on a plea of *nolo contendere* as a recognition that he did not wish to fight any further. This offer was refused by

the Chief, Safety and Special Radio Services Bureau by letter of March 2, 1971. This letter directed attention to the Order instituting this proceeding which had been released on February 4, 1971, and referred to Owens ". . . consistent denial of the alleged violations."

10. A prehearing conference and a hearing were held on February 14, 1972, at Houston, Texas. Owens appeared and was represented by counsel. The hearing was completed and the record was closed on February 14, 1972.

11. Bobby R. Owens, Sr., lives at 718 Columbia Lane, Deer Park, Texas. He is the licensee of Citizens radio station KQT–2259. A number of complaints were made to the field office of the Federal Communications Commission in Houston, Texas, by people living near Owens alleging that radio transmissions made by Owens were interfering with television reception and telephone communication. On the basis of these complaints, James E. Wells was assigned to conduct an investigation of Owens' Citizens radio station.

12. Wells is an electronic engineer who has been employed by the Federal Communications Commission for almost three years. His duties involve the inspection of radio equipment and the enforcement of FCC Rules and Regulations governing radio. He has conducted about 200 inspections involving such radio services as Industrial, Citizens, Amateur and Broadcast.

13. On March 9, 1970, Wells conducted an investigation into the operation of Owens' Citizens Band radio. He used an FCC automobile equipped for investigative purposes but, he did not use any special direction finding techniques in order to locate Owens' transmitter. He had Owens' address and he drove directly to the neighborhood in which Owens lived and proceeded to monitor transmissions on the Class D Citizens Radio Service. He heard a strong signal on Channel 5 at the frequency 27.015 MilliHertz. This frequency is authorized for use in the Citizens radio service but only by units of the same station. Wells listened to the transmission and tape recorded what was being transmitted from about 7:30 p.m. to 7:50 p.m. and from 8:35 p.m. to 8:50 p.m. He did not hear any call signs being given but he did remember hearing a reference to "Mississippi".

14. In order to determine the exact source of the transmissions Wells used a signal strength meter. His procedure was to drive a distance of about four or five blocks away from Owens' house and then to drive toward that point watching the meter indication. When approaching the point from which transmissions are emanating, the meter reading increases. Similarly, the meter decreases as you drive away from the point of transmission.

15. Wells was conducting his examination during the hours of darkness. He saw two antennas adjacent to Owens' house. As he drove closer to these antennas the signal strength meter reading increased; as he drove away from these antennas the meter reading decreased. He made several runs to assure himself that Owens' house was the place from which the transmissions he was monitoring were emanating. He did not notice any other transmitting antenna in the neighborhood at that time.

16. He parked his car across the street from Owens' home, locked his car and, after taking some necessary inspection equipment, he went directly to Owens' front door. His knock was answered by a young boy of about 8 or 10 years of age who invited Wells into the house and called his father. Owens came downstairs and after Wells showed him his credentials and told him that he wanted to inspect his Citizens radio station Owens showed him into the bedroom downstairs. In this bedroom there was a Citizens Band transceiver, a Pierce-Simpson type, Guardian 23 and a microphone. Wells felt the transceiver and it was cold indicating that it had not been in recent use. He also noticed that the transceiver was not plugged into its power source. Wells then went outside to inspect the two antennas.

17. The smaller of these two antennas had leads going into the downstairs bedroom indicating that they were connected to the equipment that Wells had just inspected. There was another antenna mounted on a tall tower alongside the house. Wells estimated, by visual observation, that the height of this tower was about 50 feet from the ground. He was not certain whether the tower was attached to the house but he did notice that it did have two beam type antennas horizontally positioned on top. He saw two large coaxial cables leading from this taller tower into the house from under the eaves of the upper story.

18. Wells did not inform Owens that he had been monitoring his station, but he did ask him to allow him to inspect the upper part of the house for radio equipment. He also asked to inspect Owens' mobile units. Owens told him he would be welcome to inspect any of his equipment the next morning at 8 o'clock. Wells did not return the next morning at 8 o'clock or at any other time thereafter to make another inspection. It was his conjecture that the transmissions he heard were emanating from equipment located upstairs in Owens' home.

19. Owens could not remember transmitting on March 9, 1970. He denied that he could recognize as his, the voice heard on the tapes which Wells took on the night of the inspection. According to Owens, the tall tower was affixed to his house, and his house, a two story structure, was 33 feet tall.

20. There was no inspections made on Owens' Citizens radio equipment prior to March 9, 1970, the inspection described above. No inspection was made subsequent to the inspection described above. Four witnesses were called by the Bureau to confirm the violations charged against Owens. None of these witnesses were involved in the inspection which took place on March 9th. One of these witnesses, Alton Earl Tschirhart, is an electronic technician who has done service work for Owens and sold him equipment. He claimed to have sold certain equipment to Owens, but he was unable to establish that that equipment was in Owens home or in use on March 9, 1970. Tschirhart admitted that he had, in his own operations, on occasion violated FCC Regulations. His testimony was at no time tied in with the violations alleged in the Order to Show Cause, and accordingly his testimony must be disregarded as irrelevant.

21. Three other witnesses called by the Bureau were neighbors of Owens who had complained about interference to television reception or telephone communication. None of these witnesses were able to testify

to the events of March 9, 1970, which are the basis of the Order to Show Cause, with the exception of Richard Coleman. Coleman claimed that there was interference to his television reception at 8:45 p.m., on March 9th. The basis for this conclusion was that Coleman heard a voice which he recognized as that of Owens. The basis of his recognition of the voice that he heard was that he had had conversations with Owens on at least two occasions. Coleman has no background or experience in radio. He is employed as an operator in a chemical plant.

22. Another witness, Charles Gurney Nelson, Jr., is a radio engineer who holds a first class license with ship radio endorsement and has been licensed in the amateur radio service. Nelson claimed some interference received from Owens' operation on his television set, but he also asserted that he received interference from power transmissions in the vicinity. His testimony as to instances of interference were not related to March 9, 1970. Nelson has a transmitting antenna which he uses in connection with his amateur radio. His antenna is of the type which would not be normally used for Citizens Band, but it is located in the vicinity of Owens' home.

23. According to Owens, there are two or three other Citizens Band radio antennas in the neighborhood in which he lives. On the date that Wells conducted his investigation he had no radio transmitting equipment in his upstairs bedroom and the only radio equipment that he had was the equipment which he showed to Mr. Wells in the downstairs bedroom. His reason for not permitting Wells to go upstairs in his home on the evening of March 9th was that his wife, who had been seriously ill, was upstairs and he did not want her to be disturbed. According to Owens, he told Wells that his reason for asking him back at 8 o'clock the next morning was that his wife was sick.

CONCLUSIONS

1. In this proceeding the burden of proof is upon the Bureau. It must be concluded on the basis of the findings herein that the Bureau has failed to sustain its burden on any of the charges of violation which form the basis of the Order to Show Cause.

2. Except for the charge of misrepresentation and lack of candor, the violations alleged herein were said to have taken place on March 9, 1970. The only relevant testimony as to the events of that date came from James E. Wells. Wells' testimony is insufficient to meet the burden of proof either because it stands uncorroborated or, where corroborated, the facts do not constitute proof of a violation.

3. When Wells set out to make his investigation he had Owens' address and he directed his attention to Owens' home. He heard transmissions and he established Owens' home as the source. He made no observation of the neighborhood, he did not check the possibility of another source for the signal he heard. Wells claims that the voice he heard and recorded was that of Owens. He was not acquainted with Owens prior to the time that he conducted his investigation. His subsequent indentification of Owens' voice cannot be accepted as reliable proof sufficient to sustain the burden of proof. See *Richard A. Pattillo*,

34 FCC 2d 386. His location of Owens' home as the source of the signal must be considered inconclusive, at best, in the light of all the evidence. Owens testified that he did not recall transmitting on March 9th as charged in the two Notices of Violation which were sent to him and the Order to Show Cause.

4. Wells was admitted to Owens' home. When he identified himself and asked to inspect Owens' Citizens Band radio he was shown a Citizens Band radio. This radio admittedly had not been in use. When Wells asked to be allowed to inspect the rest of Owens' house he was told to return the next morning. No further inspection was made. Under all of the circumstances it is concluded that Owens acted reasonably and that the requirement of the Rule that a Citizens Band station be made available for inspection upon reasonable request had been met. There is nothing in the Commission's Rules to authorize an investigator to search a man's home for equipment which the investigator may believe is there. See Section 95.103, Rules and Regulations, Federal Communications Commission. Absent proof that Owens was actually transmitting on the night of March 9, 1970, it must be concluded that there is a failure of proof as to those issues involving the alleged transmissions. Wells' estimate of the height of the antenna based upon his visual observation is insufficient to prove violation of Commission Regulations with regard to antenna height.

5. Owens is charged with misrepresentation and lack of candor as a consequence of a response filed to the Notice of Violation which had been sent on March 17, 1970. This response was a denial filed in Owens behalf by his lawyer. In any event, the Notice of Violation to which that respose had been directed was subsequently withdrawn as erroneous. Under these circumstances it must be concluded that the burden of proof has not been met as to the charge of misrepresentation and lack of candor.

6. Evidence in the form of testimony and statements from the individuals who claimed to have received interference on their television sets and telephones must be dismissed as irrelevant. As to the testimony of one witness who claimed that he heard Owens on his television set on March 9, 1970, it must be concluded that this testimony is not of sufficient weight to be material to prove any of the charges in the Order to Show Cause. On the basis of the entire record in this proceeding it is concluded that the Bureau has failed to sustain its burden of proof and the Order to Show Cause must be dismissed.

Accordingly, IT IS ORDERED that unless an appeal to this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the Order to Show Cause IS DISMISSED and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,

ERNEST NASH,
Hearing Examiner.

F.C.C. 73–359

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)) FOR "ONE-TIME ONLY" NETWORK NEWS AND PUBLIC AFFAIRS PROGRAMS

MEMORANDUM OPINION AND ORDER

(Adopted March 29, 1973; Released April 2, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING. COMMISSIONER REID ABSENT.

1. The Commission here considers the matter of continued waiver of the prime time access rule (Section 73.658(k) of the Commission's Rules) with respect to "one-time" network news and public affairs programs, those not part of a regular program series. The rule itself, as adopted in May 1970 and generally affirmed on reconsideration in August 1970,[1] contains an exemption for network "special news programs dealing with fast-breaking news events, on-the-spot coverage of news events" (and political-candidate broadcasts). These are not counted against the permissible three hours of network prime-time programming. See Section 73.658 (k)(2). The present waiver, which was first granted for 1971–72 in October 1971 following a petition by Columbia Broadcasting System, Inc. (CBS), extends that exemption, by way of waiver, to "one-time" news and public affairs programs generally, even where they are not on-the-spot coverage or involve fast-breaking news events. See *Petition of Columbia Broadcasting Systems, Inc.*, 32 FCC 2d 55 (October 1971). CBS petitioned for continuation of the waiver for the 1972–73 year; this was granted first for three months and later through March 31, 1973 (see 37 FCC 2d 570). By letter of March 12, 1973, CBS requests continuation of this waiver pending final decision in Docket 19622, the over-all prime-time-access-rule proceeding.

2. In the comments filed in Docket 19622, there was considerable discussion of the matter of network news and public affairs programming, some parties (including CBS) favoring a permanent exemption both for the type of network programs now covered by the waiver and for those network news and public affairs programs which *are* part of

[1] Report and Order in Docket 12782, 23 FCC 2d 383; Memorandum Opinion and Order in Docket 12782, 25 FCC 2d 318.

a regular series. Other parties, including Westinghouse Broadcasting Company, Inc. (which opposed CBS' 1971 and 1972 waiver petitions) urged that waiver or exemption should not be granted beyond coverage of events actually taking place at the time, in view of: (1) the fact that the networks could present this material during their usual three hours of network prime time programming, rather than encroaching into cleared "access time", so that this waiver simply makes it possible for them to get a hold on additional time; and (2) this is an area which is very important but also one where *diversity of viewpoint* is of great significance, and such material is available from non-network sources and would be so to an even greater extent if it were not for the discouraging effect of the waiver.

CONCLUSIONS

3. The decision in Docket 19622—in which reply comments were filed March 12—has not yet been reached. Accordingly, we find it appropriate to continue the *status quo* pending resolution of these matters. Decision in the over-all proceeding is expected by the end of May 1973. If the decision on this point should be along a line basically different from the present approach, a short additional time beyond the decision date will be appropriate to permit affected parties to make an orderly adjustment. Accordingly, we are herein extending the waiver previously granted, through August 31, 1972, to provide a period of somewhat more than 90 days following the expected date of the Docket 19622 decision.

4. In view of the foregoing, IT IS ORDERED, That a waiver of Section 73.658(k)(1) of the Commission's Rules, the prime time access rule, IS GRANTED to the American Broadcasting Companies, Inc. (ABC), Columbia Broadcasting System, Inc. (CBS) and National Broadcasting Company, Inc. (NBC) networks, and their owned and affiliated stations in the top 50 markets, to present, without counting toward the permissible three hours of prime time network material, "one-time-only" news and public affairs programs (those not part of a series) through August 31, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-333

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FOR EXEMPTION FROM THE PROVISIONS OF REGULATION 3, CHAPTER IV AND REGULATION 12, CHAPTER V OF THE SAFETY OF LIFE AT SEA CONVENTION, LONDON 1960 FOR THE U.S. PASSENGER FERRY VESSEL "SPOKANE"

ORDER

(Adopted March 29, 1973; Released April 2, 1973)

BY THE COMMISSION: COMMISSIONER REID, ABSENT.

1. The Commission has received an application (File No. X-1134) from Washington State Ferries for exemption from the radiotelegraph provisions and radio direction-finding apparatus provisions of the Safety of Life at Sea Convention, London, 1960 for the United States passenger ferry vessel SPOKANE.

2. The applicant makes the following statement in support of his request:

a. the vessel will be navigated on inland water between Anacortes, Washington and Sidney, Vancouver Island, British Columbia with stops at Lopez Island, Orcas Island, Shaw Island and San Juan Island;
b. the vessel will not be more than two nautical miles from land or ten nautical miles from the nearest ferry terminal;
c. the vessel is equipped with two VHF installations with provisions to monitor 156.8 MHz and 156.65 MHz simultaneously; and
d. with the short distances travelled and the number of VFH stations in the area no additional type of communications equipment will be required for safety of passengers at sea.

3. When the vessel is navigated on the above described international voyage, it is subject to the provisions of the Safety Convention. The vessel will always be within communications range of a United States Coast Guard or public coast station which maintains a continuous watch on 156.8 MHz. Under the circumstances described above, we find it unreasonable to require the SPOKANE to comply with the radiotelegraph and radio direction-finding apparatus provisions of the Safety Convention.

4. Regulation 5, Chapter IV and Regulation 12(b), Chapter V authorize the Commission to exempt passenger vessels on international voyages from the radiotelegraph installation provisions and radio direction-finding apparatus provisions, respectively, of the Safety Convention if it considers the route or other conditions affecting safety

are such as to render full application of these provisions unreasonable or unnecessary.

5. Accordingly, IT IS ORDERED, That the United States passenger ferry vessel SPOKANE, 3246 gross tons, official number 544785, be exempt from the radiotelegraph provisions of Regulation 3, Chapter IV and the radio direction-finding apparatus provisions of Regulation 12, Chapter V of the Safety of Life at Sea Convention, London, 1960 when navigated between Anacortes, Washington to Upright Head, Lopez Island via Thatcher Pass; then to Orcas Island via Harney Channel; Orcas Island to Friday Harbor, San Juan Island via Harney Channel; Friday Harbor to Sidney, Vancouver Island, British Columbia via San Juan Channel, Spieden Channel, across Haro Strait and return, never more than two nautical miles from the nearest land, for a period beginning the date of this Order and continuing for a period of one year; Provided, That: the vessel is equipped with a VHF radiotelephone which fully complies with Title III, Part III, of the Communications Act of 1934, as amended and the vessel is always within communications range of a public coast or United States Coast Guard station which maintains a continuous watch on 156.8 MHz.

6. This exemption may be terminated by the Commission at any time if, in the Commission's discretion, the need of such action arises.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-316

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE UNITED TELEPHONE CO. OF PENNSYLVANIA For Certificate of Convenience and Necessity To Construct and Operate Cable Facilities in Hanover, Pa.	Docket No. 19711 File No. P-C-7720

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 29, 1973)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application of the United Telephone Company of Pennsylvania ("United Telephone"), filed pursuant to Section 214 of the Communications Act, for a certificate that the present and future public convenience and necessity require United Telephone to construct or acquire and to operate channels for, among other things, the retransmission of broadcast signals and the transmission of local cable-casting signals by CATV operators in United Telephone's Hanover, Pennsylvania, exchange area. The application was filed on November 26, 1969.

2. Radio Hanover, Inc., a CATV company in the Hanover, Pennsylvania area, filed a petition to reject United Telephone's application on January 20, 1970; United Telephone filed an Opposition to the Petition on February 2, 1970; and Radio Hanover, Inc. ("Radio Hanover") filed its Reply on February 10, 1970.

3. On April 30, 1970, United Telephone amended its application to show that Penn-Mar CATV, Inc. ("Penn-Mar") on whose behalf the original application had been filed, was no longer affiliated with United. Radio Hanover, on June 1, 1970, filed a petition seeking denial of the amended application and for an investigation and hearing. On June 15, 1970, United Telephone filed a "Reply to Responsive Pleading"; and Penn-Mar filed its Opposition to the Petition to Deny on July 6, 1970. Radio Hanover filed a single Reply to both the United Telephone and Penn-Mar pleadings, on July 14, 1970.

4. On November 12, 1971, in response to a Commission staff letter, United Telephone filed an amendment to its application entitled "availability of Poles (Conduit) Rights to CATV Customers"; and by letter dated November 20, 1971, Radio Hanover commented on the amendment. United Telephone, on December 13, 1971, responded by letter to the Radio Hanover comments; and on January 14, 1972, Radio Hanover replied by letter. Finally, by cover letter dated March 3, 1972, and in response to a conference held at the Commission offices on February 10, 1972 United Utilities submitted a composite draft joint pole

use agreement, purporting to be "representative of the kind which the telephone operating subsidiaries of United Utilities, Inc. would be willing to enter into any exchange area." [1] Radio Hanover, by letter dated March 17, 1972, objected to the composite draft submitted by United.

5. The voluminous pleadings and correspondence in this proceeding appear to present two basic issues involving, first, the reasonableness of the agreements under which CATV operators are permitted to use poles or conduits belonging to United Telephone; and, second, whether United Telephone has engaged in monopolistic or anticompetitive practices in dealing with cable television companies. Since we have concluded that the conduct of United Telephone in dealing with Radio Hanover and those agreements (particularly the composite Joint Use Agreement submitted by United Telecommunications) raise substantial public interest issues, we are designating the matter for hearing to determine whether that conduct and those agreements are in the public interest.

6. The facts appear to be that Radio Hanover, a Pennsylvania Corporation, is the licensee of two radio stations in Pennsylvania: Station WHVR, an AM station in Hanover, and Station WYCR, an FM station in York.[2] United Telecommunications, Inc. is a Kansas Corporation and a holding company which is the parent of the United Telephone Company of Pennsylvania ("United Telephone") and United Transmission, Inc. ("United Transmission"), as well as other companies. United Telephone is a Pennsylvania corporation and is an operating telephone company authorized to provide telecommunication services in a number of exchange areas in Pennsylvania, including the community of Hanover. United Transmission was a Kansas Corporation engaged in the business of building and operating Community Antenna Television (CATV) systems.[3] The following companies are or were also involved in this proceeding: The Susquehanna Broadcasting Company (Susquehanna), a Delaware corporation, and the licensee of several radio and television stations, among them, Station WSBA–TV in York, Pennsylvania; Brush-Moore Newspapers, Inc. ("Brush-Moore") was an Ohio corporation which in 1967 owned and controlled a number of newspapers, including *The Evening Sun* of Hanover, of which it was a principal owner; Penn-Mar Publishing Company ("The Publishing Company"), was the publisher and part-owner of *The Evening Sun*.[4] Penn-Mar CATV, Inc. ("Penn-Mar") is a Pennsylvania corporation created to provide CATV service in the Hanover area, and in 1967 it was equally owned by United Transmission, Susquehanna, and the Publishing Company.

7. During the year 1965, Radio Hanover, United Transmission, Susquehanna, and *The Evening Sun* expressed an interest in obtaining a CATV franchise from the Borough Council of Hanover; and all filed

[1] On June 2, 1972, the name of United Utilities, Inc., was changed to United Telecommunications, Inc.; and it will be referred to hereinafter as "United Telecommunications."

[2] The 1971 populations of York and Hanover were 50,335 and 15,623, respectively. York is 18 miles northeast of Hanover.

[3] The factual recitations herein are drawn in part from the Findings of Fact in Judge Nealon's Memorandum denying a Preliminary Injunction in Radio Hanover, Inc. v. United Utilities, Inc., 273 F. Supp. 709 (M.D. Pa., 1967).

[4] It would appear that Thomson-Brush-Moore Newspapers, Inc., has succeeded Penn-Mar Publishing Co. as publisher of *The Evening Sun* (*Ayer Directory of Publications*, N. W. Ayer & Son, Inc., Philadelphia, Pa., 1972, p. 703).

formal applications with the Borough prior to January 1, 1966, the cut-off date for the filing of applications. In mid-1965, however, the United Telephone Company of Pennsylvania, whose poles could be utilized for the CATV distribution cable, had announced the adoption of a policy of not entering into agreements with CATV companies for the attachment of their cables to United Telephone Company poles. (United Telephone Applic. for Section 214 Certif., filed November 26, 1969, Affidavit of John G. Siemons). Instead, United Telephone offered to provide distribution channel service, as a common carrier under published tariffs, to anyone for lawful purposes.

8. On June 8, 1966, the four applicants attended a meeting of the Borough Council when it was suggested by the Borough President that all the applicants join together and form one company for the purpose of seeking a franchise. After considering this suggestion, Radio Hanover rejected it, but United Transmission, Susquehanna, and *The Evening Sun* joined together and formed Penn-Mar CATV, Inc., which was formally incorporated on August 19, 1966. In the meantime, Radio Hanover had informed United Telephone that it was interested in leasing space on United Telephone poles [5] for the purpose of constructing Radio Hanover's CATV system thereon, if it were successful in obtaining a franchise. On August 30, 1966, United Telephone notified Radio Hanover that it would not enter into agreements with CATV companies for the leasing of space on the United Telephone poles for the attachment of CATV cable equipment, but that it would construct the necessary cable facilities itself and then lease them to the respective companies.

9. On October 19, 1966 the Hanover Borough Council by Ordinance No. 1331 granted franchises to both Radio Hanover and Penn-Mar, and extended to them the right to construct a CATV system in the Borough; but the Council specified that no poles could be erected within the Borough by those companies without the express authorization of the Council. Instead, both Radio Hanover and Penn-Mar were directed to arrange to use the poles of the public utilities companies (United Telephone and Metropolitan Edison). On December 13, 1966 Radio Hanover executed a CATV pole attachment agreement with Metropolitan Edison in which Radio Hanover was authorized to attach its CATV cables to Metropolitan Edison's poles at a rental of $4.50 per pole per year. United Telephone, however, persisted in its refusal to allow Radio Hanover to attach its cable system to United Telephone's poles; but, at the same time, it reiterated that it would construct the necessary cable facilities and lease them to Radio Hanover. Radio Hanover considered the proposal unacceptable, and filed a civil antitrust suit against United Utilities, Inc.; United Transmission; United Telephone; Susquehanna; Brush-Moore Newspapers, Inc.; Penn-Mar Publishing Co.; and Penn-Mar CATV, Inc., alleging a conspiracy to monopolize CATV and broadband coaxial cable services in violation of the Sherman Act, 26 Stat. 209; 15 USC § 1. While Radio Hanover's Motion for a Preliminary Injunction to restrain the defendants' construction or operation of a CATV system in the Han-

[5] At the time there were 1,137 poles owned by United Telephone in Hanover Borough, and 1,317 poles owned by the electric utility, Metropolitan Edison Company.

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over area, was denied on March 27, 1967 (273 F. Supp. 709) the suit itself is still pending in the Federal District Court for the Middle District of Pennsylvania.

10. After the Preliminary Injunction was denied construction was commenced on the Penn-Mar CATV system, and on May 15, 1967 Radio Hanover filed another suit in the Federal District Court for the Middle District of Pennsylvania, alleging a violation of Section 214 of the Communications Act by Penn-Mar, and seeking an injunction against further construction or operation. A motion to dismiss this suit was denied on October 2, 1967 (1967 Trade Cases, para. 72,228; 11 RR 2d 2040 (1967)). Penn-Mar's CATV system became operational on September 1, 1967. Radio Hanover, however, elected not to go forward with construction of its system, because it considered the use of telephone company poles indispensable to its proposed system.

11. On November 26, 1969, United Telephone filed an application for a Section 214 certificate to construct or acquire and operate channels for use, among other things, by CATV operators in its Hanover Exchange Area. The application was said to be in compliance with the Commission's Decision of June 25, 1968 in Docket 17333 (*General Telephone Co. of California*, 13 FCC 2d 448) which requires telephone companies to file applications for, and be issued, Section 214 certificates prior to constructing or operating CATV facilities, either for themselves or for independent CATV operators. Radio Hanover, on January 20, 1970, filed a petition to deny the United Telephone application, and requested that it be required to cease and desist from operating a CATV system, because, first, United Telephone had been on notice as far back as April, 1967 that further construction of CATV facilities without a Section 214 certificate would be at its own risk; and, second, United Telephone's application failed to comply with the Commission's decision of June 25, 1968. Specifically, Radio Hanover alleged that the United Telephone Application did not state that no operator, other than United Transmission, holds a franchise or is otherwise authorized to operate a CATV system in Hanover (Decision, para. 40(c), 13 FCC 2d at 467), and that prior to the time that distribution facilities were constructed no application by a competing operator or prospective operator for a pole line attachment arrangement was pending before the carrier (Decision, para. 40(d), 13 FCC 2d at 467).

12. United Telephone filed its Opposition to Radio Hanover's Petition on February 2, 1970, alleging that the issuance of a cease and desist order would not be in the public interest because disruption of CATV service to the public would result because of the lack of alternate facilities. In addition, it was stated that the potential for abuse from affiliation between the CATV operator and the telephone company did not exist, because United Telephone did not have legal or *de facto* control over Penn-Mar. Radio Hanover's Reply, filed February 10, 1970, maintained that United Telephone had failed to justify a stay of the Commission's Decision and Order of June 25, 1968, and that a cease and desist order ought to issue promptly.

13. On April 30, 1970, United Telephone amended its application for a Section 214 certificate to show that the one-third stock interest in Penn-Mar which had been owned by United Transmission had been sold in equal parts to Penn-Mar Publishing Company and Susquehanna Broadcasting Company, and that, therefore, no affiliation remained between Penn-Mar CATV, Inc., and either United Utilities, Inc. or United Telephone. Radio Hanover, on June 1, 1970, filed a petition to deny the amended application of United Telephone, contending, *inter alia*, that despite the transfer of stock, Penn-Mar remained an affiliated company to United Telephone; and, further, that United Telephone conspired wrongfully to monopolize cable television in Hanover and should not, therefore, be permitted to retain the fruits of that wrong-doing; but that the money obtained by the sale to Penn-Mar Publishing Co. and Susquehanna ought to be placed in escrow pending a determination of the legality of United Telephone's conduct. Radio Hanover also maintained that it had been ready to construct its facilities since 1967 and would have done so had it not been for United Telephone's unlawful conduct. Radio Hanover urged that the Section 214 certificates be denied, and that United Telephone be required to divest itself completely of its cable facilities to others than Susquehanna and Penn-Mar Publishing Co.

14. Regarding the monopoly matter, Radio Hanover specifically alleged that at first United Telephone sought to monopolize cable television in Hanover; that it tried to imply to the Hanover Borough Council that the Council had to award the franchise to United Telephone's affiliated company because pole attachment rights would not be granted to other applicants; that, thereafter, United Transmission combined with the newspaper and television interests in a competing application to Radio Hanover's; and that, despite warnings of illegality, a leaseback arrangement was made and uncertificated leaseback facilities were built for Penn-Mar, while United Telephone was still refusing pole attachments for Radio Hanover. After this was accomplished, Radio Hanover alleges that Penn-Mar proceeded promptly to try to sign up all of Hanover as its subscribers; and it was only when it was realized that the Commission would not permit CATV service to be provided by a telephone company or its affiliate that the United Transmission interest was sold.

15. We regard the anticompetitive charges as substantial and pertinent to the question of whether a Section 214 certificate ought to issue to United Telephone. The inclusion of an issue regarding alleged anticompetitive and monopolistic practices by United Telephone will not impinge in any way upon the antitrust suit now pending in the Middle District of Pennsylvania. It is well established that this Commission has not only the right but the obligation to examine into such allegations in carrying out its statutory responsibilities whether or not an antitrust suit is pending. *Philco Corp.* v. *FCC*, 293 F. 2d 864 (D.C. Cir. 1961). We are, therefore, including an issue regarding United Telephone's alleged monopolistic and anticompetitive practices, and we are placing the burden of proof on Radio Hanover. We are also including provisions in this order regarding the antitrust suit, so that any decision in that suit adverse to United Telephone can be fully

considered by this Commission in determining whether to grant a Section 214 certificate to United Telephone.

16. United Telephone's Reply, filed on June 15, 1970, reiterated that the issuance of a cease and desist order would cause the disruption of CATV service to the public in the Hanover area, and that Radio Hanover's charges of unlawful conduct are unsupported by specific factual allegations. Furthermore, the allegations of wrong-doing by United Telephone are at issue in two cases pending in the U.S. District Court for the Middle District of Pennsylvania.[6] United Telephone maintains that since Radio Hanover filed suit in the District Court under the Sherman Act (Case No. 9845) and also sought an injunction there against United Telephone under Section 214(c) of the Communications Act, it is barred by the Communications Act from complaining about the same acts to this Commission. Finally, United Telephone contended that Radio Hanover had no standing to oppose the grant of a Section 214 certificate to a competitor, since both itself and Penn-Mar have non-exclusive franchises to provide CATV service in the Hanover area. United Telephone cites several cases in support, including *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 209 (1940) and *Chesapeake and Potomac Telephone Company of West Virginia*, 22 FCC 2d 577 (1970). Section 214(c) provides that a court of competent jurisdiction can enjoin violations of Section 214 at the suit of, among others, "any party in interest." Clearly, Radio Hanover is a "party in interest" in this proceeding, and to contend that it can bring suit in a U.S. District Court, but not before this Commission makes no sense; and so we unhesitatingly find Radio Hanover to have standing to oppose the issuance of a Section 214 certificate to United Telephone (See also, *Better TV, Inc. of Dutchess County, N.Y.*, 17 FCC 2d 367 (1969).) Likewise, we do not find Radio Hanover barred from bringing this action here, simply because it has filed two suits in a federal court. The first suit involves alleged violations of the Sherman Act; and, according to Radio Hanover's Reply[7] filed July 14, 1970, the second is for injunctive relief under Section 214. Besides an injunction, Radio Hanover's Amended Complaint sought treble damages and an order permitting Radio Hanover to attach its CATV cable to United Telephone's poles (or in United Telephone's conduits, if utilized in lieu of poles) "at rates reasonably comparable to those established in the industry, which rates will be the subject of good faith bargaining". While the issues in the law suit and in this proceeding are closely related, as we have already noted, nevertheless, under Section 214(a) the responsibility and authority to issue Section 214 certificates rests exclusively with this Commission. No issue of damages is involved here; and we find Section 207 of the Communications Act, cited by both United Telephone and Penn-Mar in its Opposition to Petition to Deny, to be inapposite.

17. The Penn-Mar Opposition was filed on July 6, 1970, and denied all of the allegations raised in the Radio Hanover Petition to Deny. Penn-Mar asserted that United Transmission now has no interest in Penn-Mar CATV, Inc.; that there is currently no relationship, legal

[6] *Radio Hanover, Inc.* v. *United Utilities, Inc.*, Case No. 9845 and *Radio Hanover, Inc.* v. *United Telephone Co. of Pennsylvania*, Case No. 9994.
[7] Reply, p. 3, Footnote.

or beneficial, between Penn-Mar and United Transmission; that the fact that Penn-Mar leases cable facilities from United Telephone under filed tariffs has no bearing on the question of affiliations; and that all of the United Transmission stock was sold to the other two stockholders who also assumed the contingent obligations of United Transmission. Penn-Mar's arguments regarding the impropriety of Radio Hanover pursuing its cases in the District Court and this proceeding have already been addressed above. The only additional point to be made is that if we should ultimately decide that it would be in the public interest to grant a Section 214 certificate to United Telephone, and the court case involving Sherman Act violations (Civil Action No. 9875) is still pending, issuance of the certificate will be appropriately conditioned upon the outcome of the court case. Radio Hanover filed a Reply to the Penn-Mar and United Telephone pleadings on July 14, 1970. Radio Hanover argued that Penn-Mar, having built its cable facilities illegally, should not be heard to complain that the Commission cannot take remedial action for fear that innocent people would suffer.

18. On October 15, 1971, the Commission advised counsel for United Telephone by letter that the U.S. Court of Appeals for the Fifth Circuit had affirmed the policy and rules adopted by the Commission in *Section 214 Certificates*, 22 FCC 2d 746 (1970), including Section 63.57 of the Rules. The letter stated, in part:

> As you know, such rule [Section 63.57] requires Respondent [United Telephone] to show that the CATV system to be served has been afforded an opportunity to attach to Respondent's poles and that any other CATV system within Respondent's telephone service area also has been afforded a similar opportunity to attach to Respondent's poles on the same terms. It does not appear that such pole attachment option provided for in the Commission's rules has been made available either to Respondent's proposed customer, Penn-Mar CATV, Inc., or to Radio Hanover, Inc., both CATV companies with franchises to serve the Hanover, Pennsylvania area.
>
> Commission policy is clear that a telephone company must, within the limitations of technical feasibility, make space on its poles available as an option to a proposed channel service customer and any other CATV operator in its telephone service area, at reasonable charges and without undue restrictions on the uses that may be made of its facilities by the CATV operator or operators.
>
> Inasmuch as the subject application does not show compliance with the provisions of Section 63.57 of the Commission's rules, Respondent is directed to file, within 30 days of the date of this letter, an amendment showing compliance with this rule.

19. In response to the Commission letter, United Telephone filed an amendment to its application on November 12, 1972, captioned "Availability of Poles (Conduit) Rights to CATV customers." The amendment states that while no CATV operator in the Hanover area had a right to occupy pole or conduit space on United Telephone poles in the years 1964–1968, or at the time that the Penn-Mar CATV facilities were constructed, under modified policies adopted in 1969, and still in effect, the opportunity to occupy pole or conduit space has been available under a "Joint Use Agreement" at "reasonable charges and without undue restrictions on the uses that may be made of the channel by the customer." The amendment further states that Penn-Mar CATV, Inc., was orally offered the opportunity to place its own cable distribution facilities on United Telephone's poles, or in its conduits, on July 24, 1969 and February 12, 1970, and that specific written offers

were made on December 24, 1969 and August 10, 1970. The amendment states, finally, that Radio Hanover was orally offered the opportunity to have its cable distribution facilities, when constructed, placed on United Telephone's poles or in its conduits on February 26, 1969; and that the offer exists today, not only in the Hanover Exchange Area, but throughout United Telephone's other territories in Pennsylvania.

20. Radio Hanover commented upon the United Telephone amendment by letter dated November 20, 1971, denying that attachment opportunities contemplated by the Commission's rules have ever been offered in Hanover either to Radio Hanover or Penn-Mar CATV, Inc. The "Attachment Rights" under the "Joint Use Agreement", Radio Hanover contends, cannot be considered a *bona fide* pole attachment offering, because, for example, those Joint Use Agreements generally grant the telephone company the option to construct and maintain the CATV distribution system and also grant the telephone company options to acquire ownership in a major portion of the radio frequency spectrum of the cable, "completely negating the intention that the entrepreneur should be able to attach his own cable, which he can control, on the poles controlled by the telephone company. In addition, the telephone company proposals substantially prohibit the provision of common carrier services on the CATV facilities. Provisions also may be used to impede the offering of access channels."

21. In response to Radio Hanover's comments, United Telephone filed a letter on December 13, 1971, to which a sample Joint Use Agreement was attached. United Telephone denied Radio Hanover's allegation that attachment opportunities contemplated by the Commission's rules have never been offered in Hanover. On the contrary, according to United Telephone, the CATV operator is permitted to carry, in addition to TV and FM radio program material, interstate and intrastate common carrier communication services, provided there shall first have been obtained from this Commission, or the appropriate state commission, a certificate of public convenience and necessity, and provided further, that there shall be an agreement between the CATV operator and the telephone company, or a determination by the appropriate commission, as to the appropriate division of revenue. United Telephone reserved the right to oppose the issuance of any such certificate to the CATV operator. This provision was said to be reasonable in light of the requirement that telephone companies obtain Section 214 certificates prior to providing channel service to CATV customers. Regarding installation and maintenance of CATV distribution facilities by the telephone company, United Telephone contends that it is reasonable to maintain some control of the equipment placed on its poles; and in practice, however, United Telephone system companies have permitted CATV operators to construct and maintain their distribution facilities, as provided in the agreements. The grant in the agreement of an option to United Telephone to lease unused radio spectrum space in the cable is considered by United Telephone to be reasonable in that it goes only to unused radio spectrum outside the TV and FM broadcast bands, and is a suitable *quid pro quo* for the use of unused pole space by the CATV operator in which to attach his facilities.

22. Radio Hanover commented on the United Telephone filing by letter dated January 13, 1972. Once again, Radio Hanover maintained

that no attachment opportunities as contemplated by the Commission's rules had ever been offered in Hanover, except in settlement negotiations among counsel, and then on a "take it or leave it" basis. While no specific mention had been made of the reasonableness of charges for pole attachments by CATV operators, Radio Hanover considers that matter to be very much in issue. Radio Hanover considers the following conditions of the joint use agreement to be undue restrictions in violation of Section 63.57 of the Rules:

(a) the inhibition against the CATV operator providing common carrier services;
(b) the grant of an option to the telephone company to construct and maintain the CATV system;
(c) the grant of an option to the telephone company to control radio spectrum space both within, and outside of, the "VHF" and FM broadcast bands; and
(d) the provision that the telephone company will perform installation and maintenance work for the CATV operator on a no-priority basis, while at the same time prohibiting the CATV operator from holding out that the telephone company has any responsibility for the service provided.

23. Finally, at a Commission staff conference held on February 10, 1972, United Telephone agreed to construct a single "most favored nation" Joint Use Agreement which would be a composite draft of the best agreement available from the viewpoint of the CATV operator. This agreement would be representative of the kind which the telephone operating subsidiaries would be willing to enter into within any exchange area. This composite draft was filed on March 6, 1972, and commented upon by Radio Hanover by letter dated March 17, 1972. In its comments, Radio Hanover contended that the agreement continued to impose substantial and illegal impediments to the realization of CATV potential service offerings. Specific reference was made to slight modifications of previous agreements, such as one which related to the requirement that a CATV operator obtain a certificate from the FCC or an appropriate state commission prior to handling any common carrier services; to a clause which was added to state that the requirement was not necessary if not required by law; and to options reserved to United Telephone to acquire ownership of spectrum space in the CATV cable, now modified to provide for joint ownership or lease of facilities. It was noted that prior provisions relating to "No Priority" maintenance responsibilities and United Telephone's exclusive right to terminate the agreement raised substantial questions which were still unresolved.

24. As we noted earlier (Para. 5, supra) we believe that agreements such as those existing between telephone companies in the United Telephone system and CATV operators utilizing pole space on United Telephone poles raise serious and substantial questions as to whether they are in compliance with Commission policies pertaining to CATV service. We realize that there is a hearing now in progress to determine what the policies are throughout the cable television industry relating to pole attachment rights of CATV operators who must utilize telephone company poles (*California Water & Telephone Co.*, Dkts. 16948, 16943, and 17098, 22 FCC 2d 10 (1970)); but we believe that there is a need, not only for an adjudicatory proceeding to determine the general telephone company policies pertaining to pole attachments, but also the practical problems encountered in specific geographical areas. It

might well be that the practical problems are of such a magnitude as to impede substantially the development of CATV service, as contemplated in our Report released February 3, 1972 37 Fed. Reg. 3252; Reconsideration Denied 37 Fed. Reg. 13848 July 14, 1972. We stated there our belief that cable television had come of age, and that the time had come for it to realize some of its great potential within a national communications structure (Report, para. 117). We also concluded that cable television is an emerging technology that promises a communications revolution (Report, Para. 189), and while our regulatory pattern must evolve as cable evolves, nevertheless we considered the state of the art to be sufficiently well developed now to require that there be built into cable systems the capacity for return communications on at least a non-voice basis. "Two-way communication, even rudimentary in nature, can be useful in a number of ways for surveys, marketing services, burglar alarm devices, educational feedback, to name a few." (Report, para. 128). While we did not require return communication devices at each subscriber terminal, we considered it sufficient that each cable system be built with the potential of eventually providing return communication without having to engage in time-consuming and costly system rebuilding (Report, para. 129).

25. In addition to our recent policy statements there is the matter of the pole attachment policy set out in Section 63.57 of our Rules, and whether United Telephone has complied with it. Section 63.57 provides, *inter alia*, that applications filed by telephone companies for Section 214 certificates to construct or operate channel distribution facilities for CATV systems must contain a showing that the independent CATV system proposed to be served had available at its option, and within technical feasibility, pole attachment (or conduit) rights at reasonable charges and without undue restrictions on the uses that may be made of the channels by the CATV operator. The fact that United Telephone filed its application before May 1, 1970 is of no significance, because the Note to the Rule provides that applications filed before that date may be granted if the Commission is satisfied that the CATV system proposed to be served now has available such pole attachment or conduit rights, and still desires channel service. We are persuaded that there are substantial and material questions of fact pertaining to compliance with the rule, requiring the designation of the United Telephone application for hearing.

26. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Sections 4j, 208, 214, 217, 218, 313, and 403 of the Communications Act, that the application of the United Telephone Company of Pennsylvania for a Section 214 certificate of public convenience and necessity to construct or operate distribution facilities for channel service to CATV systems in its Hanover, Pennsylvania, Exchange Area is DESIGNATED FOR HEARING ON THE FOLLOWING ISSUES:

(1) To determine whether Penn-Mar CATV, Inc., and Radio Hanover, Inc., have available, at their option, pole attachment, or conduit, rights, as contemplated by Section 63.57 of the Commission's Rules;

(2) If such rights are available, to determine the reasonableness of the charges imposed by United Telephone Company of Pennsylvania;

(3) To determine whether United Telephone Company of Pennsylvania has imposed restrictions on the uses that may be made of any CATV cable attached

to its poles and whether such restrictions are "undue" within the meaning of Section 63.57 of the Commission's Rules; and

(4) To determine whether United Telephone Company of Pennsylvania, in connection with the provision of cable television service in the Hanover, Pennsylvania, area has engaged in any practices which are:

(a) anticompetitive or monopolistic; or

(b) contrary to the public interest standards of the Communications Act; or

(c) in violation of any rule, decision, of policy of the Federal Communications Commission.

(5) To determine in light of the facts adduced at the hearing (a) whether the public convenience and necessity require a grant of the application of the United Telephone Company of Pennsylvania; and (b) if so, whether any conditions should be imposed on such a grant; and

27. IT IS FURTHER ORDERED, That the burden of proceeding and the burden of proof on Issues (1), (2), (3) and (5) is upon United Telephone Company of Pennsylvania; and the burden of proceeding and the burden of proof on Issue (4) is upon Radio Hanover, Inc.

28. IT IS FURTHER ORDERED, That Radio Hanover, Inc.; Penn-Mar CATV, Inc.; and the Chiefs of the Common Carrier and Cable Television Bureaus ARE MADE PARTIES to this proceeding; and

29. IT IS FURTHER ORDERED, That the hearing will be held at the Commission's offices in Washington, D.C., on a date, and before an Administrative Law Judge, to be specified in a subsequent Commission order; and

30. IT IS FURTHER ORDERED, That if Case No. 9875, *Radio Hanover, Inc.* v. *United Utilities, Inc., et al.* is still pending in the United States District Court for the Middle District of Pennsylvania at the time that a Final Decision is rendered in this proceeding, and if such Final Decision grants the pending application of United Telephone, such grant will be conditional upon the outcome of that law suit; and

31. IT IS FURTHER ORDERED, That if a final adjudication or resolution, in the above-described Case No. 9875 is entered during the pendency of this proceeding, the parties to this proceeding shall promptly notify the Commission of this fact and file copies of such final adjudication or resolution with the Commission. Within 15 days after such notification and filing, any party to this proceeding may file a motion with the Commission requesting such further proceedings as may be thought necessary for Commission consideration of such final adjudication or resolution.

32. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this order by certified mail, return receipt requested, to United Telephone Company of Pennsylvania; Radio Hanover, Inc.; and Penn-Mar CATV, Inc., and shall cause a copy to be published in the Federal Register; and

33. IT IS FURTHER ORDERED, That interested parties may avail themselves of an opportunity to be heard by filing with the Commission, pursuant to Section 1.221(c) of the Commission's Rules within twenty (20) days of the release date hereof, a written notice stating an intention to appear on the date set for hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–130

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK–TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT–327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT–4465

MEMORANDUM OPINION AND ORDER

(Adopted March 26, 1973; Released March 27, 1973)

BY THE REVIEW BOARD:

1. Both the Broadcast Bureau and Las Vegas Valley Broadcasting Co., (Valley) have appealed from a ruling of the Presiding Judge rendered orally in a further prehearing conference held on February 1, 1973, to the effect that the scope of the issues designated in this proceeding by the Commission (fraudulent billing practices, misrepresentation and standard comparative issues) will be limited to the specific instances described in the Bureau's July 12, 1972 Bill of Particulars.[1]

2. In its appeal, the Bureau argues that the Judge's ruling is in direct conflict with Commission precedent and that it is the designation Order, not the Bill of Particulars, which defines the "outer limits" of the hearing. Appellant requests the Board to rule that inquiry under the designated issues encompasses Western's entire license period, and further, that it would be relevant to determine "when and under what circumstances the clipping started even if this predated the license period." In addition, Valley appeals the "tentative" ruling of the Presiding Judge that, in Valley's words, "Valley will not be permitted to show clipping of network programming by KORK–TV during the last license period under the past performance aspect of the comparative issue, in addition to that specified in the Bill of Particulars, unless the Broadcast Bureau fails to prove the Bill of Particulars; because such evidence would be merely repetitive." In opposition, Western contends that, rather than "freeze" the scope of the issues, the Presiding Judge

[1] The Bureau's appeal was filed February 2, 1973, and Valley's appeal on February 7, 1973. Also before the Review Board are the following related pleadings: (a) comments on Valley's appeal, filed February 12, 1973, by the Broadcast Bureau; (b) motion for leave to file opposition in excess of 15 pages, filed February 14, 1973, by Western; (c) opposition to both appeals, filed February 14, 1973, by Western; and (d) reply, filed February 27, 1973, by Valley. In light of the facts that Western's opposition is directed to both appeals and that it only exceeds the page limitation by two pages, it will be accepted and the motion for leave to file granted.

afforded the Bureau an opportunity to amend its Bill of Particulars, and suggested to Valley the avenue of requesting enlargement of issues. Western would have the Board find no manifest abuse of discretion sufficient to justify a reversal.

3. The Review Board is of the view that the Judge's ruling limiting the scope of the issues to the specific incidents alleged in the Bill of Particulars is clearly contrary to Commission precedent and therefore must be overturned. See *WPIX, INC.*, 25 FCC 2d 678, 19 RR 2d 1148 (1970); and *Chronicle Broadcasting Company*, 20 FCC 2d 33, 17 RR 2d 663 (1969), reconsideration denied, 23 FCC 2d 162, 19 RR 2d 204 (1970). *Cf. Belk Broadcasting Co., of Florida, Inc.*, 27 FCC 2d 921, 21 RR 2d 351 (1971). The Board is of the opinion, however, that the Bureau's request to have the Board delineate the limits of the inquiry is unwarranted; such a ruling would be tantamount to an advance determination of relevancy, a question which is more properly within the province of the Presiding Judge in the first instance. See *American Broadcasting Companies, Inc.* (*ABC*), 20 FCC 2d 603, 17 RR 2d 1080 (1969). Further, Valley's request to reverse the ruling of the Presiding Judge with regard to the scope of the comparative issue is procedurally defective, Valley having neither asked for, nor received, leave to appeal. Section 1.301(b) of the Commission's Rules.

4. Accordingly, IT IS ORDERED, That the motion for leave to file opposition in excess of 15 pages, filed February 14, 1973, by Western Communications, Inc., IS GRANTED; and

5. IT IS FURTHER ORDERED, That the appeals, filed February 2, 1973 and February 7, 1973, by the Broadcast Bureau and Las Vegas Valley Broadcasting Co., respectively, ARE GRANTED to the extent indicated herein, and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-317

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION) Transmittals 6834 and 6844; and Revisions of Telex Tariff F.C.C. No. 240 and Teleprinter Exchange (TWX) Tariff F.C.C. No. 258	Docket No. 19696

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 28, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. By Memorandum Opinion and Order adopted in this docket on February 21, 1973, we suspended for one day, entered an accounting order and set for hearing revised tariff schedules filed by Western Union on December 29, 1972 to become effective February 28, 1973 (FCC 73-212, Released March 6, 1973). These December, 1972 revised schedules, among other things, proposed substantial increases in charges designed to produce additional revenues for the carrier of about $12.0 million in 1973, and to increase Western Union's (a) earnings from Telex from 14.8% to 18.0% in 1973, (b) earnings from TWX from 8.6% to 12.3% in 1973, and (c) overall earnings from 5.4% to 6.7% in 1973.

2. On January 26, 1973, Western Union filed further revisions in its Telex and TWX tariffs under Transmittal No. 6844 and these tariffs are scheduled to become effective March 27, 1973. They are now before us for consideration and appropriate action.

3. Under these further tariff revisions, the rates and rate structure applicable to supplemental message services offered to Telex and TWX subscribers would be changed so as to impose additional charges for such message services and to produce additional overall revenues to the carrier of about $3.2 million in 1973, $4.8 million in 1974, and $5.5 million in 1975. The services in question are "Telex Computer" and "TWX Computer" services. Under these particular classes or subclasses of services, Telex and TWX subscribers may use their Telex and TWX terminal facilities to transmit written messages through Western Union computers for ultimate delivery to other Telex and TWX subscribers and to non-Subscribers served by public message telegraph offices. At the present time, the rate elements applicable to these supplemental computerized message services are made up of the regular Telex and TWX subscriber charges plus a charge per message that is composed of two factors: a fixed "service" charge and a "usage" charge

that varies with both time and distance. The revised tariffs in question make changes in the "service" and "usage" charges, as set forth hereinafter.

4. The increases in charges proposed by these further filings result primarily from increases applicable to Telex and TWX messages transmitted through computers to non-subscribers. For such messages the carrier proposes to establish a $2.00 service charge for regular telegrams and a $1.00 service charge for overnight telegrams sent by Telex and TWX subscribers to non-subscribers in lieu of certain minimum charges now applicable, and to establish a $1.50 messenger delivery charge for such messages where the subscriber requests physical delivery. Also, the usage charges for such messages are being postalized to apply a generally lower flat rate for each minute of use or portion thereof in lieu of the present zone charges based on distance. The effect of these changes in the charges for Telex and TWX messages to non-subscribers is to produce about $2.8 million of the total $3.2 million of additional revenues predicted for 1973 from the entire tariff filing. The remainder of the projected additional revenues ($343,000 in 1973) is attributable to slight increases the carrier is proposing in the per minute (or portion thereof) usage charges for messages from Telex and TWX subscribers to other Telex and TWX subscribers; to a change in the service charge for such messages from 10¢ per message to 10¢ per minute; and to the extension of the offer of Telex-to-TWX message service to Canadian TWX subscribers.

5. Western Union has submitted costs and other data to support this filing, including the direct testimony of supporting witnesses. The carrier claims that the average revenue requirements per message (including an 18% return factor) for messages to Telex and TWX subscribers will be $1.42 in 1973, $1.28 in 1974 and $1.18 in 1975 but that, under present rates, the average revenue per message will be $1.06 for 1973, $1.10 in 1974, and $1.11 in 1975. Thus, the carrier contends that it must increase its revenues as to these messages. Under the revised tariffs, Western Union claims that the average revenue per message will increase to $1.14 in 1973, $1.18 in 1974 and $1.18 in 1975 at which time the average revenue requirement per message will be met by the average revenue per message insofar as messages to Telex and TWX subscribers are concerned. As to the per message revenue requirements for messages to non-subscribers, Western Union claims that the average requirement will be $3.87 in 1973, $3.68 in 1974, and $3.59 in 1975. However, the increased rates will produce estimate revenues per message of $4.31 in 1973, $4.32 in 1974, and $4.32 in 1975 insofar as messages to non-subscribers are concerned.

6. The revised tariffs raise the question of whether we should designate such tariffs for hearing in conjunction with the December, 1972 tariffs increasing the basic charges for Telex and TWX services. Although the carrier has submitted cost data indicating that the proposed increases for messages to Telex and TWX subscribers may be cost-justified, we have never tested the principles or methods used by Western Union in determining the claimed revenue requirements for these services. Furthermore, these revisions are inter-related with the

charges for the basic services that are now in hearing; they will impose increased charges on Telex and TWX subscribers in addition to the basic rates now at issue in the hearing herein; and they will increase the carrier's earnings from Telex and TWX services by an undetermined amount over and above the increases in earnings generated by the increases in the basic rates that are in litigation. Accordingly, we conclude that we should amend our order in this proceeding to suspend the effectiveness of this later filing, require accounting to provide for possible refunds, and designate such tariff revisions for hearing.

7. Accordingly, IT IS ORDERED, That, pursuant to the provisions of Sections 201, 202, 203, 204, 205 and 403 of the Communications Act of 1934, as amended, an investigation is instituted into the lawfulness of the tariff schedules filed by The Western Union Telegraph Company submitted with Transmittal No. 6844 including any cancellations, amendments or reissues thereof; and no changes shall be made in such tariff schedules during the pendency of this proceeding without prior approval by the Commission;

8. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204, such tariff schedules ARE HEREBY SUSPENDED until March 28, 1973, and that Western Union shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision therein, the Commission may by further order require the refund thereof, with interest, pursuant to Section 204 of the Act, and the carrier shall file such reports on the amounts accounted for as aforesaid as the Chief, Common Carrier Bureau shall require;

9. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the issues set forth in paragraph 11 of our Memorandum Opinion and Order herein adopted February 21, 1973 (FCC 73–212) in consolidation with the proceeding in Docket 19696.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*